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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

AMERICAN AIRLINES, INC., et al.,

Petitioners,

vs.

ROY E. DOOLEY, JR., et al.,

Respondents.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RUSSELL M. PELTON,
Counsel of Record,

M. PATRICIA CHAPIN
PAULETTE J. CUSICK
PETERSON, ROSS,
SCHLOERB & SEIDEL
200 East Randolph Drive
Suite 7300
Chicago, Illinois 60601
(312) 861-1400
Attorneys for Petitioners

QUESTIONS PRESENTED FOR REVIEW

The questions presented are the following:

1) Whether the Court of Appeals impermissibly departed from the standards applicable to summary judgment adopted by other Circuit Courts of Appeal by finding that a material issue of fact was raised solely on the basis of inadmissible expert testimony.

2) Alternatively, whether the Court of Appeals' reversal of the district court's implicit ruling on the insufficiency of Respondents' evidence solely on the basis of opinion testimony so discredited that it was of insufficient caliber to allow a rational finder of fact to find for the Respondents is inconsistent with the standards applicable to summary judgment adopted by other Circuit Courts of Appeal.

LIST OF PARTIES

The parties to the proceeding below were the Petitioners American Airlines, Inc., the American Airlines, Inc., Fixed Income Plan of the Pilot Retirement Benefit Program, G.E. Overbeck, T.G. Plaskett, T.F. Quinn, Jr., C.A. Pasciuto and N.W. Byl and the Respondents Roy E. Dooley, Jr., Thomas F. Latta, Lionel T. Alexander, Lowell W. Armstrong, Buford O. Baker, W.S. Baugh, Alvin Bradley, William H. Burgess, Hugh T. Clark, Byron S. Cramblet, Frank J. Cusare, Clarence O. Day, Jr., E.R. Dozier, Clyde E. Driggers, R.M. Euwema, J.R. Fitzgerald, William D. Fulton, Ralph E. Green, Walter J. Gromel, William J. Goeke, Frank G. Hart, F.J. Hazzard, Howard F. Jenkins, Jr., James G. Johnson, Frank Kaplowitz, Norman L. Kleman, W.C. Kraemer, A.P. Lang, H.D. Leavell, Ralph W. Long, Jr., Dale F. Mabry, Joseph K. Marks, Robert W. Martin, Boniface J. Mayer, Edward O. McKown, Jr., Harold R. Miller, H.C. Milton, George A. Moculski, Earl M. Morrow, Stanley R. Nielsen, Arne E. Oas, George A. Oden, Wayne C. Parris, Robert K. Parsons, Angelo B. Perriello, J.C. Pollard, Edward C. Price, Russell A. Quandt, John J. Ranck, Harvey R. Rice, H.E. Rogers, W.J. Roth, J.M. Rutledge, R.C. Speck, and Willard I. Staples. The above named Petitioners and Respondents include all of the parties to the proceedings below and in this Court. Petitioner American Airlines, Inc. is a wholly owned subsidiary of AMR Corporation. The affiliates of American Airlines, Inc., are AMR Services Corporation, American Airlines Direct Marketing Corporation, and AMR Information Services, Inc.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

AMERICAN AIRLINES, INC., et al.,

Petitioners,

vs.

ROY E. DOOLEY, JR., et al.,

Respondents.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners, AMERICAN AIRLINES, INC., ET AL., respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on August 5, 1986 with respect to Counts II through IV of Respondents' Complaint.

OPINIONS BELOW

The decision of the Court of Appeals for the Seventh Circuit is reported at 797 F.2d 1447. Petitioners have reprinted the opinion in Appendix A hereto as pp. A-1 through A-14. The memorandum opinion and order of the United States District Court for the Northern District of Illinois, Eastern Division (Parsons, J.) is unreported. Petitioners have reprinted that opinion and order in Appendix A hereto as pp. A-15 through A-19.

JURISDICTION

Respondents brought suit in the District Court for the Northern District of Illinois, pursuant to 28 U.S.C. §§ 1331 and 1337(a) and 29 U.S.C. § 1132(a). The district court on April 17, 1985 granted Petitioners' motion for summary judgment on Counts I thorugh IV of Respondents' Third Amended Complaint and denied Respondents' motion for summary judgment on Count I. *Dooley v. American Airlines, Inc.*, No. 81 C 6770 slip op. (N.D. Ill. Apr. 17, 1985) (Slip op., App. A at A-19).

The Court of Appeals for the Seventh Circuit affirmed the district court's grant of summary judgment in favor of Petitioners with respect to Count I, but reversed the court's decision with respect to Counts II through IV and remanded for further proceedings. *Dooley v. American Airlines, Inc.*, 797 F.2d 1447 (7th Cir. 1986) (Slip op., App. A at A-11). No rehearing was sought.

The jurisdictional basis for this Court's review of the judgment below is 28 U.S.C. § 1254(1). Petitioners rely upon Supreme Court Rule 19.5 in filing their Cross-Petition for a Writ of Certiorari. Petitioners received Respondents' Petition for a Writ of Certiorari in this case, No. 86-725, on November 3, 1986.

STATUTES AND RULES INVOLVED

The statutes involved in Counts II through IV of Respondents' Third Amended Complaint, which are the subject of this Cross-Petition, are the following:

1. Sections 203 and 404(a)(1)(A) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1053 and 1104 (a)(1)(A).

2. Rule 56 of the Federal Rules of Civil Procedure; and

3. Rule 702 of the Federal Rules of Evidence.

Each of these provisions is reprinted in Appendix B.

STATEMENT OF THE CASE

Nature of the Case

Petitioner American Airlines, Inc. maintains and is the Plan Administrator of a Pilot Retirement Benefit Program which is subject to the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 et seq. Respondents are retired former American Airlines pilots who requested and received lump-sum payouts of their retirement benefits from the Fixed Income Plan of the Pilot Retirement Benefit Program, which is funded solely by contributions from American Airlines. After receiving their lump-sum payments, the average of which exceeded $222,000, Respondents filed suit pursuant to Section 502(a) of ERISA, 29 U.S.C. § 1132(a), challenging one aspect of the administration of the Fixed Income Plan. Named as defendants in that suit were Petitioner American Airlines, Inc., the Fixed Income Plan, and the five members of the American Airlines Pension Benefits Administration Committee serving during the time period relevant to the lawsuit.

Under the Fixed Income Plan, upon retirement each of the Respondents, as an American Airlines pilot employee, was entitled to a lifetime annuity. (Doc. No. 85, Ex. A, Art. II(1), Art. VII, § 7.3., and Art. X, § 10.2).[1] However, each Respondent chose to receive his lifetime annuity in an alternate form of payment, a lump sum under the Plan's "open option" provision. (Doc. No. 85, Ex. A, Art. VII, § 7.1 and Art. X, § 10.4).

The Plan required by its express terms that any alternate form of payment be actuarially equivalent to the retiree's lifetime annuity, in accordance with "actuarial factors approved from time to time by American Airlines." (Doc. No. 85, Ex. A, Art. X, § 10.4 and Art. II(d)). Actuarial equivalence was calculated by the Plan Administrator by

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[1] References to Document No. _____ are references to the Docket Number of the cited document in the Record on Appeal. References following the Document Number identify the particular part of the document cited.

multiplying the annual benefit otherwise provided a retiree under the Fixed Income Plan by a lump-sum annuity factor. (Doc. No. 84, at 10). This annuity factor was comprised of a discount interest rate and an entry from a mortality table, the actuarial factors approved by the Plan Administrator pursuant to the mandate of the Plan cited above. These factors were necessary to determine the present value of a retiree's expected future annuity payments so that a single lump sum could be distributed to the retiree at his retirement.

The interest rate assumption is an estimate of what the pension trust fund assets would earn in the future, in order to account for the fact that after payment of the lump-sum, the trust fund would no longer earn interest on that money as it would if the money remained in the fund and was paid out in monthly annuity payments. The result of the computation must be such that the pension fund is not adversely affected by the retiree's choosing a lump-sum payment of his retirement benefit. (Doc. No. 85, Ex. C at 5). Otherwise, of course, actuarial equivalence would not have been achieved and the retiree would have received more than that to which he had been entitled under the Fixed Income Plan.

The Plan Administrator chose an interest assumption of 8½ percent on October 26, 1978 to be used in the computation of actuarially equivalent lump sums. (Doc. No. 85, Ex. B). During the four-plus years preceding October, 1978, long-term interest rates had fluctuated in the narrow range of 7¾ percent to 9¼ percent. (Doc. No. 85, Ex. C at 6-7). Accordingly, the Plan Administrator initially chose an interest rate of 8½ percent to be used in the present value conversion of the expected annuity payments into lump sums. (Doc. No. 85, Ex. B).

Shortly after October, 1978, when the availability of the lump-sum option and the 8½ percent interest discount factor were announced, interest rates began to rise. By year-end 1979, long-term corporate bond rates had reached 10½ percent. (Doc. No. 85, Ex. C at 7). Predictions by economists as to future interest rate levels varied considerably and included predictions that interest rates could reach the unprecedented level of 14

percent to 15 percent in the near future. (Doc. No. 84 at 12). In fact, the prime interest rate reached a high of 21.5 percent by January of 1981. (Doc. No. 85, Ex. C, p. 2 of Ex. II). By year-end 1979, it had become apparent to the Plan Administrator that the 8½ percent discount rate was no longer a realistic measure of the value of a lump sum. (Doc. No. 84 at 12). Accordingly, at the end of 1979, the Plan Administrator, on the advice of the Plan actuary and in accordance with its express authority in the Plan to do so, decided to use an independent bond index, Moody's Aaa Corporate Bond Rate plus one percent,[2] as a standard for determining the interest rate component of the present value calculation for converting retirees' annuities to lump sums. (Doc. No. 85, Ex. D). This index was chosen because it would conform to fluctuating prevailing interest rates and would better reflect the pension trust's expected rate of return on investments for the term over which retirees' annuities would have been paid. (Doc. No. 85, Ex. D). The use of the bond index was phased in over a period of several months. (Doc. No. 84, Ex. E).

Respondents retired between February 1, 1981, and October 1, 1982 and chose to receive lump-sum payments of their retirement benefits. (Doc. No. 67, ¶¶ 2(a)-(eee); Doc. No. 81, ¶¶ 2(a)-(ee)). The record indicates that all but one of the Respondents rolled over their lump-sum payments into Individual Retirement Accounts in order to postpone taxation on the lump sums. (Doc. No. 84, at 14-15). The table which is attached as Exhibit I to the affidavit of Petitioners' expert, actuary Willard Hartman, illustrates that several of the Respondents have received returns on their investments at much higher rates, as high as 23 percent, than were assumed

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[2] Moody's Corporate Bond Ratings are described in Moody's Industrial Manual as the "opinion of Moody's Investors Service, Inc., as to the relative investment classification of bonds. Bonds which are rated Aaa are judged to be of the best quality." *Moody's Industrial Manual*, Vol. 1, at v-vi (1983). The one percentage point was added to reflect the fact that the American Airlines pension trust includes both lower-rated bonds and equities which generally provide higher rates of return. (Doc. No. 85, Ex. C at 7).

in the calculation of their lump sums. (Doc. No. 85, Ex. I to Ex. C).

Following the receipt of their lump-sum distributions, Respondents brought suit under ERISA challenging the use of the independent bond index rather than the 8½ percent fixed rate in the present value computation. Petitioners contended in their successful motion for summary judgment that such an administrative change in actuarial assumptions was not only lawful, but was mandated by the requirement of the Fixed Income Plan that the Plan Administrator approve from time to time such actuarial assumptions as necessary to maintain the actuarial equivalence of alternative payment options to retirees' lifetime annuities.

Petitioners supported their motion for summary judgment, with, among other items, two affidavits of their expert witness, actuary Willard Hartman.[3] (Doc. No. 85, Ex. C and Doc. No. 117, Ex. X). Two of the major points of Mr. Hartman's testimony with respect to the issue of determining "actuarial equivalence" are the following:

1. "[T]he interest rate used to compute the single [lump] sum should reflect the rate the trust itself would earn

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[3] Mr. Hartman is a Vice President and Actuary with The Wyatt Company, Chicago, Illinois, an actuarial, benefits and consulting firm. He is a member of The Wyatt Company's Board of Directors and is Chairman of the Actuarial Practice Committee. Mr. Hartman is a fellow of the Society of Actuaries, a Member of the American Acadamy of Actuaries, a Fellow of the Conference of Actuaries in Public Practice, and an Enrolled Actuary. In addition, he is a Member in the International Actuarial Association and Astin and a Member of the International Association of Consulting Actuaries. His qualifications further include his membership on the Board of Directors and Executive Committee of the Conference of Actuaries in Public Practice and on the Board of Directors and Budget and Finance Committee, and Audit Subcommittees, of the American Academy of Actuaries. He is the Chairman of the Pension Committee of the American Academy of Actuaries and a Member of the Pension Committee of the Conference of Actuaries in Public Practice. (Doc. No. 85, Ex. C at 1-2).

over the time horizon that the lifetime benefit would otherwise have been paid out;" and

2. "The adoption of Moody Aaa Corporate Bond Rate plus 1 percent to determine the interest rate to be used in computing 'actuarial equivalence' is a reasonable basis for measuring the investment opportunity available to the fund and the resulting rate is consistent with the definition of 'actuarial equivalent' set forth in the Plan."

(Doc. No. 85, Ex. C at 5).

Respondents relied upon the testimony of their expert, retired educator, Mr. Carl Fischer, to rebut Mr. Hartman's testimony. Mr. Fischer agreed with the first point above, giving the following deposition testimony:

Question by Petitioners' counsel:

"So the interest [rate] is, I take it, an estimate at the present time of what the fund assets will earn in the projected future?"

Answer by Mr. Fischer:

"Yes, emphasis on the word estimate."

(Doc. No. 117, Ex. W at 11). Mr. Fischer disagreed in his affidavit with the second point above, opining as to the reasonableness of the 8½ percent interest rate originally used by the Plan Administrator and the unreasonableness of the bond index later chosen by the Plan Administrator to compute actuarially equivalent lump sums. (Doc. No. 106 at 33-34). However, Mr. Fischer was compelled to retract this testimony at his deposition when he admitted that he was "not a market rate specialist" and could not answer the question as to what marketplace rates of interest he would regard as being reasonable:

Question by Petitioners' counsel:

"What are some of the marketplace rates of interest that you would regard as being reasonable to consider in establishing a floating rate?"

Answer by Mr. Fischer:

> "I'm not a market rate specialist and I really couldn't tell you what I think would be the best ones. I would leave that up to the financial experts."

Question by Petitioners' counsel:

> "So you're not in a position to say which particular market rates are more reasonable than others, I take it?"

Answer by Mr. Fischer:

> "No, I think not. . . ."

(Doc. No. 117, Ex. W at 14). Mr. Fischer reiterated later in his deposition that he is "not an investment expert," (Doc. No. 117, Ex. W at 23), and that he does not follow interest rates. (Doc. No. 117, Ex. W at 21). In fact, Mr. Fischer retired at the time that ERISA took effect. (Doc. No. 117, Ex. W at 14). During Respondents' counsel's questioning of Mr. Fischer at his deposition, in response to Petitioners' counsel's objection to Mr. Fischer testifying in the area he had admitted no expertise, Mr. Fischer indicated that he had disclaimed knowing or being an expert in that area and would stand by that acknowledgment. (Doc. No. 117, Ex. W at 42).

Petitioners raised repeated objections below to the testimony of Mr. Fischer relating to the appropriateness or inappropriateness of the interest rate initially chosen by the Plan Administrator, the one later chosen, or interest rates in general. (Doc. No. 117, Ex. W at 41; Doc. No. 116 at 38; Def. Appellate Br. at 40-41).

Course of Proceedings and Disposition in Courts Below

Count I of Respondents' Third Amended Complaint asserted that the change in interest assumption constituted an "amendment" to the Plan and reduced Respondents' "accrued benefits" under the Plan in violation of § 204(g) of ERISA, 29 U.S.C. § 1054(g). Count II asserted, alternatively, that the index chosen by the Plan Administrator to be used as the interest assumption was unreasonably high, and that its choice was in violation of the terms of the Plan and the

vesting provisions of § 203 of ERISA, 29 U.S.C. § 1053. Count III contended that the decision to change the interest assumption constituted a breach of fiduciary duty under § 404(a)(1)(A) of ERISA, 29 U.S.C. § 1104(a)(1)(A). Finally, Count IV sought injunctive relief from the acts alleged in Counts I through III.

In a Memorandum Opinion and Order entered April 17, 1985, Judge James B. Parsons of the District Court for the Northern District of Illinois granted Petitioners' Motion for Summary Judgment on all four counts and denied Respondents' Motion for Partial Summary Judgment on Count I. *Dooley v. American Airlines, Inc. et al.*, No. 81 C 6770, slip opinion (N.D. Ill. Apr. 17, 1985) (Slip op., App. A at A-19.) The district court impliedly agreed with Petitioners with respect to the evidentiary issue raised by the testimony of Carl Fischer, Respondents' intended expert. In holding that "the defendants' action served to insure actuarial equivalence," the court necessarily ruled that the evidence supported the Plan Administrator's choice and that Respondents' evidence was insufficient to raise a genuine issue for trial. (Slip op., App. A at A-19).[4]

The Court of Appeals for the Seventh Circuit affirmed the district court's grant of summary judgment in favor of Petitioners with respect to Count I. *Dooley v. American Airlines, Inc.*, 797 F.2d. 1447 (7th Cir. 1986) (Slip op., App. A at A-11). However, the district court's decision with respect to Counts II through IV was reversed and remanded for further proceedings. The Seventh Circuit found that an issue of fact had been raised with respect to the allegations of Counts II and III "regarding the actuarial appropriateness of setting

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[4]The district court need not have expressly commented upon this finding in his memorandum opinion. *Westside Property Owners v. Schlesinger*, 597 F.2d 1214, 1217-18 n. 3 (9th Cir. 1979) (district court has no obligation to address explicitly every point raised by the parties); *Continental Assurance Company v. Tucker*, 138 F.Supp. 242 (S.D. N.Y. 1955) (district court has no obligation to discuss every issue raised and a lack of commentary may not be assumed to reflect a lack of consideration).

the interest assumption at the 'Moody's + 1' rate." (Slip op., App. A at A-12.) The Court of Appeals based its finding on the portion of the affidavit of Respondents' expert, Mr. Fischer, where he had testified as to the reasonableness of the 8½ percent rate, the unreasonableness of the Moody's rate, and the need to employ a combination of interest rates in the present value computation, disregarding the later admissions of Respondents' witness that he was *not* an expert in that area.

Petitioners seek review of the Seventh Circuit's remand of Counts II through IV contending that the Court of Appeals impermissibly departed from the standards applicable to summary judgment by finding that a material issue of fact was raised solely on the basis of inadmissible expert testimony.

REASONS FOR GRANTING THE WRIT

I.

THE COURT OF APPEALS IMPERMISSIBLY DEPARTED FROM THE STANDARDS APPLICABLE TO SUMMARY JUDGMENT ADOPTED BY OTHER CIRCUITS BY FINDING THAT A MATERIAL ISSUE OF FACT WAS RAISED SOLELY ON THE BASIS OF INADMISSIBLE EVIDENCE.

A. The Relevant Testimony of Respondents' Expert, Carl Fischer, Was Inadmissible and Cannot Be Considered Under Federal Rule of Civil Procedure 56(e).

While Respondents presented no admissible evidence to challenge the bond index chosen by the Plan Administrator, Petitioners established through valid expert testimony that the choice was proper. Petitioners' expert, actuary Willard Hartman, opined that "[t]he adoption of Moody's Aaa Corporate Bond Rate plus one percent to determine the interest rate to be used in computing 'actuarial equivalence' is a reasonable basis for measuring the investment opportunity available to the fund and the resulting rate is consistent with the definition of 'actuarial equivalent' set forth in the Plan." (Doc. No. 85, Ex. C at 10).

Respondents relied solely upon their purported expert, Carl Fischer, to contradict Mr. Hartman's testimony. Mr. Fischer admitted at his deposition that no one interest rate used to determine actuarially equivalent lump sums is proper to the exclusion of all others and that the rate should be pegged on a rate reflected in the marketplace. Mr. Fischer also admitted that it is preferable to have a rate which is outside of the employer's discretion. Mr. Fischer stated further that under present conditions, a plan administrator cannot come out with a single rate that is going to last forever. (Doc. No. 117, Ex. W at 11, 12 and 14). All of these requirements point to the use of a variable rate. American's Plan Administrator could not have chosen an index better suited to Mr. Fischer's requirements than if Mr. Fischer himself had been the Plan's advisor.

Mr. Fischer could not testify, however, as to what specific index, rate or possible combination of rates should have been chosen by the Plan Administrator to compute actuarially equivalent lump sums. All of Mr. Fischer's testimony relating to the appropriateness of the interest rate chosen initially by the Plan Administrator and the inappropriateness of the rate later chosen, to other rates or combinations of rates which could have been chosen, or to interest rates in general was inadmissible as a result of his repeated admissions that he was not an expert on the subject of interest rates.

Mr. Fischer admitted at his deposition that he is *not* a market rate specialist and could not answer the question what is a reasonable rate to be used as the interest assumption in the lump sum calculations. (Doc. No. 117, Ex. W at 14). Mr. Fischer testified that he "would leave that up to the financial experts." *Id.* Mr. Fischer admitted further that he "is not an investment expert", and that he does not follow market interest rates. (Doc. No. 117, Ex. W at 14, 21 and 22).

Any statement in Mr. Fischer's affidavit as to what is a reasonable choice in interest rates or that the Moody rate is an unreasonable rate is inadmissible evidence and must be excluded. *See* discussion *infra*. In relying upon the inadmis-

sible testimony of Mr. Fischer's affidavit to find a question of fact, the Seventh Circuit has departed from the long-standing body of law governing summary judgment and evidentiary matters recognized by this Court and in every other Circuit.

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). This Court explained the terms "material" and "genuine" in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. ___, 106 S.Ct. 2505, 2510 (1986):

> As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. . . . [A material fact is genuine] if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.

In the instant case, the only arguably material issue with respect to the allegations of Count II, as defined by the substantive law, is whether the Plan Administrator's choice of the bond index was arbitrary or capricious, resulting in lump sums which were not actuarially equivalent to respective lifetime annuities.[5] However, that question never rose to the level of a genuine issue for trial.

As set forth *supra*, Petitioners submitted admissible and probative evidence that the Plan Administrator's choice was not arbitrary or capricious. Respondents' evidence on the issue was inadmissible, however, and would not even have reached a jury; therefore, it could not possibly have served as

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[5] Respondents contend that the "arbitrary and capricious" standard is inapplicable. However, under either the "arbitrary and capricious" standard or that proposed by Respondents, *see* discussion *infra*, no genuine issue for trial has been raised.

a reasonable basis for returning a verdict in favor of Respondents. This Court made that clear in the *Anderson* decision: "[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.*, 106 S.Ct. at 2511. Moreover, even admissible evidence must sufficiently favor the nonmoving party that a jury could reasonably return a verdict in its favor. In the *Anderson* decision, a libel action, this Court explained that "there is no genuine issue if the evidence presented in the opposing affidavits is of insufficient caliber or quantity to allow a rational finder of fact to find actual malice by clear and convincing evidence." *Id.* at 2513.

In reversing and remanding Counts II through IV, the Seventh Circuit relied solely upon the testimony of Mr. Fischer to find a question of fact "regarding the actuarial appropriateness of setting the interest assumption at the 'Moody's + 1' rate." (Slip op., App. A at A-12.) In support of its finding, the Court of Appeals quoted at length from those portions of Mr. Fischer's affidavit where he had testified as to the reasonableness or unreasonableness of certain interest rates and indices. *Id.* The Court of Appeals' complete reliance upon inadmissible testimony to find a disputed issue of material fact is in direct violation of Rule 56(e) of the Federal Rules of Civil Procedure.

Rule 56(e) of the Federal Rules of Civil Procedure provides the following:

> [W]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Fed. R. Civ. P. 56(e). Rule 56(e) further provides that "[s]upporting and opposing affidavits shall be made on personal knowledge, *shall set forth such facts as would be admissible*

in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Fed. R. Civ. P. 56(e) (emphasis added).[6] Courts interpreting this rule have repeatedly upheld the Rule's admissibility requirement. *In re Japanese Electronic Products*, 723 F.2d 238, 258 (3rd Cir. 1983), *rev'd on other grounds*, *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, ____ U.S. ____, 106 S.Ct. 1348 (1986); *Coca Cola Company v. Overland, Inc.*, 692 F.2d 1250, 1254-55 (9th Cir. 1982); *Merit Motors, Inc. v. Chrysler Corporation*, 569 F.2d 666 (D.C. Cir. 1977); *Lynch v. Merrell—National Laboratories*, No. 84-400-MA slip op. (D. Mass. Oct. 17, 1986) (A copy of this opinion may be found in App. C at C-1).

In the lower court opinion in the *Zenith* case, the district court explained that inadmissible evidence, including inadmissible expert testimony, cannot be considered in a Rule 56 determination:

> [I]t is undisputable that a Rule 56 determination must be made upon admissible evidence. *See* Rule 56(e). In determining admissibility under Rule 56, the same standards apply as at trial. *See Munoz v. International Alliance of Theatrical Stage Employees*, 563 F.2d 205, 207 n.1 (5th Cir. 1977); *608 Hamilton Street Corp. v. Columbia Pictures Corp.* 244 F.Supp. 193, 195 (E.D. Pa 1965). Thus, in ruling upon summary judgment motions, courts refuse to consider hearsay (*Daily Press, Inc. v. UPI*, 412 F.2d 126, 133 (6th Cir.), *cert. denied*, 396 U.S. 990, 90 S.Ct. 480, 24 L.Ed.2d 453 (1969); *Trist v. First Federal Savings and*

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[6] It is not only any affidavits filed which must contain admissible evidence. The above decisions make clear that only evidence based upon facts which would be admissible at trial may be considered by the court in determining the appropriateness of summary judgment. Of course, the evidence need not be *in the form of* admissible evidence; i.e., an affidavit would not normally be an admissible *form* of evidence for trial. Ordinarily, the affiant would actually testify at trial. However, the evidence to be considered from the affidavit must be admissible.

Loan Association, 466 F.Supp. 578, 588-89 n.15 (E.D. Pa. 1979) (Lord, Ch. J.)); unauthenticated documents (*California Pacific Bank v. Small Business Admin.*, 557 F.2d 218, 222 (9th Cir. 1977); *United States v. Dibble*, 429 F.2d 598 (9th Cir. 1970); inadmissible expert testimony (*Merit Motors, Inc. v. Chrysler Corp.*, 569 F.2d 666, 671-74 (D.C. Cir. 1977); *Herbert v. Lando*, Civ. No. 74-434 (CSH) (S.D.N.Y. March 19, 1980); documents without a proper foundation (*Hamilton v. Keystone Tankship Corp.*, 539 F.2d 684, 686 (9th Cir. 1976); parol evidence (*Starling v. Valmac Industries, Inc.*, 589 F.2d 383 (8th Cir. 1979), and even evidence barred by the dead man's rule (*Super Valu Stores, Inc. v. First National Bank*, 463 F.Supp. 1183, 1192-93 (M.D. Ga. 1979).

Zenith Radio Corporation v. Matsushita Electric Industrial Co., 505 F.Supp. 1125, 1139 (E.D. Pa. 1980), *aff'd in part and rev'd in part on other grounds, In re Japanese Electronics Products*, 723 F.2d 238 (3rd Cir. 1983), *rev'd on other grounds, Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, ___ U.S. ___, 106 S.Ct. 1348 (1986). The Third Court of Appeals agreed with the District Court on this point: "The Rule 56 inquiry is whether the *admissible* evidence in the record in whatever form . . . fails to establish a prima facie case or defense." *In re Japanese Electronics Products*, 723 F.2d 238, 258, *rev'd on other grounds, Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, ___ U.S. ___, 106 S.Ct. 1348 (1986) (emphasis added.)

That only admissible evidence may be relied upon to defeat a properly supported motion for summary judgment and that unqualified testimony, expert or otherwise, is inadmissible cannot be doubted. In the *Merit Motors* decision cited by the district court in *Zenith*, the Court of Appeals affirmed the lower court's grant of summary judgment, recognizing that the opinion of an expert witness may not be considered in a summary judgment proceeding where it has no basis other than theoretical speculation. *Merit Motors, Inc. v. Chrysler Corp.*, 569 F.2d 666, 672-73 (D.C. Cir. 1977) (Skelly Wright, J.). The expert in the *Merit* case had made unsupported assumptions and had admitted a lack of knowledge in

a certain area. *Id.* This is exactly the case here.[7] Furthermore, in *Coca-Cola Company* v. *Overland, Inc.*, 692 F.2d 1250, 1255 (9th Cir. 1982), the Ninth Circuit held that statements of defendant's employees as to the thoughts of defendant's customers when ordering soft drinks were inadmissible and must be disregarded under Rule 56 because the employees were not qualified to testify as to thoughts of third parties. The court found further that, even if the affidavits were to be considered, they were too speculative and insubstantial to establish the existence of a genuine issue of material fact. *Id.*

Mr. Fischer's admissions have rendered him unqualified to testify as to the appropriateness or inappropriateness of any interest rate chosen by the Plan Administrator. Nor may he testify that some kind of averaging technique should have been employed. Respondents relied solely on Mr. Fischer's testimony on that point, which testimony was again inadmissible. Having admitted that he is not an expert on interest rates and could not testify as to what would have been a reasonable rate to choose, Mr. Fischer may not testify as to the necessity of employing some combination of rates to

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[7] Moreover, the D.C. Circuit noted in *Merit* with respect to the plaintiffs' failure to come forth with appropriate evidence that the case had been filed several years earlier, that a voluminous record had been compiled and that a substantial amount of discovery had taken place. *Id.* at 669. Again, these facts are similar to those of the instant case. The original complaint in this action was filed in 1981. (Doc. No. 1). The Cross-Motions for Summary Judgment were filed in 1983. (Doc. Nos. 69 and 83). The final supporting materials were filed in 1984. (Doc. No. 117). More than fifty depositions were taken and the exhibits in support and in opposition to the motion for summary judgment were hundreds of pages long. (Docs. No. 85, 105, 106 and 117). Respondents had every opportunity to attempt to produce admissible evidence in support of their claims and failed to do so. In three years, Respondents could not locate a single expert witness who was qualified and willing to testify that the bond index chosen by the Plan Administrator was improper under any standard. A trial on this issue cannot be necessary, especially in light of the extensive, competent evidence submitted by Petitioners on the issue.

achieve a reasonable average. In the absence of expertise, such testimony is purely speculative and inadmissible. *Merit Motors, Inc. v. Chrysler Corp.*, 569 F.2d 666, 672-73 (D.C. Cir. 1977) (Skelly Wright, J.).[8]

B. Mr. Fischer Could Not Qualify As An Expert With Respect to the Relevant Issue Under Federal Rule of Evidence 702.

Moreover, Mr. Fischer could not qualify as an expert under Rule 702 of the Federal Rules of Evidence on the issue of the appropriateness of the interest rate chosen by the Plan Administrator. Rule 702 allows expert testimony only by those "qualified by knowledge, skill, expertise, training, or education . . ." Fed. R. Evid. 702. Mr. Fischer's admissions with respect to his lack of expertise rendered him unqualified and his testimony of insufficient caliber to be considered

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[8]The raising of this point merely illustrates Respondents' misunderstanding as to what the interest rate assumption is intended to reflect even though Mr. Fischer conceded that the interest rate assumption should reflect what the fund assets will earn in the projected future. (Doc. 117, Ex. W at 11). Petitioners' expert explained in his deposition that the concept of averaging is inappropriate because at any particular point in time the funds that are going to be distributed as lump sums could have been invested at a rate that was applicable at that particular point in time. (Doc. 117, Ex. X at 58).

That the proper means of determining "actuarial equivalence" is to choose an interest rate which will reflect what the trust could earn over the period of the retiree's expected lifetime is not only a mathematical fact of life, as evidenced by the agreement of the parties' experts, but is also unequivocally established by the fact that American Airlines dedicated a bond portfolio in 1981 for the payment of benefits for the following twenty-five years of present retirees and vested terminated employees with earnings such that the investment return assumption on that portion of plan liabilities was set at 16.09 percent. (*See* Doc. No. 106, 1981 American Airlines Actuarial Report attached as Exhibit A to Affidavit of Carl Fischer). Respondents have admitted that the pension trust was able to purchase this bond portfolio.

under Rule 702. *United States v. Marabelles*, 724 F.2d 1374, 1381-82 (9th Cir. 1984); *Merit Motors, Inc. v. Chrysler Corp.*, 569 F.2d 666, 672-73 (D.C. Cir. 1977); *Lynch v. Merrell-National Laboratories*, No. 84-400-MA, slip op. (D. Mass. October 17, 1986) ("[A]bsent admissible and competent expert testimony grounded on evidence comporting with the requirements of the Federal Rules of Evidence, the plaintiffs cannot raise a genuine issue of material fact concerning Bendectin's role in the causation of Margo Lynch's birth defect.") (*See* App. C, at C-21).[9]

All of Mr. Fischer's testimony relating to the appropriateness or inappropriateness of the rate chosen by the Plan Administrator in its discretion was inadmissible and was required to be excluded as a matter of law under Federal Rule of Evidence 702 and Federal Rule of Civil Procedure 56(e). The admissible and *uncontradicted* testimony of Petitioners' expert that the interest rate chosen was reasonable, consistent with the terms of the Plan, and achieved actuarial equivalence rendered Petitioners entitled to summary judgment under Counts II through IV as a matter of law.

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[9]The Seventh Circuit cited only *Munson v. Friske*, 754 F.2d 683 (7th Cir. 1985), in support of its finding that a genuine issue for trial had been raised and its citation of that case was only for general principles applicable to summary judgment with respect to the drawing of inferences from the record. (Slip op., App. A at A-12). However, as the Seventh Circuit recognized in *Munson*, the trial judge who grants a defendant summary judgment has concluded that the evidence submitted by plaintiff which it intends to rely upon at trial could not reasonably support a verdict in its favor. *Id.* at 690. This statement makes clear that the court may not draw inferences from evidence which would not even have been before the trier of fact; i.e., inadmissible evidence.

II.

THE AMERICAN PLAN ADMINISTRATOR'S USE OF MOODY'S Aaa CORPORATE BOND RATE PLUS ONE PERCENT IN THE COMPUTATION OF RESPONDENTS' LUMP SUMS WAS NEITHER "ARBITRARY OR CAPRICIOUS" NOR AN ERRONEOUS DECISION ON A QUESTION OF LAW. THEREFORE, THE SEVENTH CIRCUIT SHOULD HAVE AFFIRMED THE DISTRICT COURT'S GRANT OF SUMMARY JUDGMENT IN FAVOR OF PETITIONERS.

A. Under the Arbitrary and Capricious Standard, the Plan Administrator's Action Must Be Sustained as a Matter of Law.

Respondents alleged in Count II that the bond index chosen by the Plan Administrator as the discount factor for the present value conversion of their lifetime annuities into lump sums was unreasonably high, resulting in their receiving lump sums which were less than actuarially equivalent to their annuities in violation of the terms of the Plan and the vesting provisions of ERISA, 29 U.S.C. § 1053.

The "arbitrary and capricious" standard is the proper standard to be applied to the allegations of Count II because, in actuality, Respondents are claiming that the Plan Administrator improperly interpreted two plan provisions.[10] The Plan requires that an optional form of payment be the

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[10] Respondents sometimes imply, but cannot contend that a "reasonableness" standard applies. It is "well established that federal courts may not review for reasonableness substantive provisions of a pension plan." *Norman v. United Mine Workers*, 755 F.2d 509, 510 (6th Cir. 1985) citing *United Mineworkers of America Health & Retirement Funds v. Robinson*, 455 U.S. 562, 574 (1982). The Sixth Circuit reiterated in the *Norman* decision that "while a court may not review a pension plan provision for reasonableness, it 'may review the *administration* of a pension fund to determine whether the provisions are applied in an arbitrary or capricious manner.'" *Norman v. United Mine Workers*, 755 F.2d at 510 quoting *Moore v. Reynolds Metals Company Retirement Program for Salaried Employees*, 740 F.2d 454, 456 n.4

(footnote continued on next page)

"actuarial equivalent" of a retiree's Basic Retirement Annuity and defines the term "actuarial equivalent" as "the equivalent in value on the basis of actuarial factors approved from time to time by American Airlines." (Doc. No. 85, Ex. A, Art. X, § 10.4 and Art. II (d)). Thus, Respondents' assertion that the actuarial factor approved by the Plan Administrator is too high is a claim that the Plan Administrator approved an inaccurate actuarial factor.

A court will not substitute its judgment for that of a pension plan administrator, particularly in a decision requiring specialized expertise, absent a finding of arbitrary and capricious action. *Govoni v. Bricklayers, Masons and Plasterers*, 732 F.2d 250, 252 (1st Cir. 1984); *Sharron v. Amalgamated Insurance Agency Services, Inc.*, 704 F.2d 562 (11th Cir. 1983); *Dhayer v. Weirton Steel Division of National Steel Corporation*, 571 F.Supp. 316, 328 (N.D. W.Va. 1983), *aff'd, Sutton v. Weirton Steel*, 724 F.2d 406 (4th Cir. 1983), *cert. denied*, 467 U.S. 1205 (1984); *Donaldson v. Hamburg Savings Bank*, 568 F.Supp. 897, 899 (E.D.N.Y. 1983); *Czyz v. General Pension Board*, 578 F.Supp. 126, 130 (W.D. Pa. 1983); *Lewis v. Fulton Federal Savings and Loan Association Pension Retirement Plan*, No. C82-736A, slip. op. (N.D. Ga. Aug. 31, 1983)(App. C at C-22). This standard is particularly applicable where, as in the instant case, "the plan itself accords broad discretion to the fiduciaries," *Donaldson v. Hamburg Savings Bank*, 568 F.Supp. at 900 citing *Fontecchio v. United Steelworkers*, 476 F.Supp. 1023, 1027 (D. Colo. 1979); *see also, Rosenthal v. National Life Insurance Co.*, 486 F.Supp. 1018, 1022 (S.D.N.Y. 1980), and the decision to act, is made on the basis of the advice of the plan's actuaries. Such reliance is completely proper. *Streeter v. Board of Trustees*, 435 F.Supp. 1168, 1171 (C.D. Cal. 1977), *aff'd, Tomlin v. Board of Trustees*, 586 F.2d 148 (9th Cir. 1978). Respondents and the Seventh Circuit would have the District Court examine in isolation one aspect of the administration of this multi-faceted Plan and substitute its

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(footnote continued from preceding page)

(6th Cir. 1984), *cert. denied*, 469 U.S. 1109 (1985) (emphasis in original).

judgment for the expertise of the experienced administration committee, despite the historical refusal of the judiciary to so interfere. *Czyz v. General Pension Board*, 578 F.Supp. 126 (W.D. Pa. 1983). Moreover, the *Czyz* opinion illustrates that there is nothing arbitrary or capricious about using an independent source, such as a bond index, to determine one of the aspects of a lump sum computation. Neither is there anything arbitrary or capricious about using the specific index chosen by the American Plan Administrators, Moody's Aaa Corporate Bond Rate plus one percent.

In *Lewis v. Fulton Federal*, which involved virtually identical facts, the index chosen by the Plan Administrator in the instant case, Moody's Aaa Corporate Bond Rate plus one percent, was considered by the Fulton Federal Committee and rejected for the higher twenty-year U.S. Treasury Note and Bond index. (Slip op., App. C at C-29). The *Lewis* court found in a summary judgment proceeding that the Fulton Federal Committee's choice was not arbitrary or capricious. It is significant to note that the operative time period, during which the appropriateness of the Moody's Aaa Corporate Bond Rate plus one percent is in question, is the same in this case as it was in the *Lewis* case.

In addition, the Internal Revenue Service in Revenue Ruling 79-90, 1979-1 C.B. 155, stated that an acceptable variable interest rate assumption for the computation of optional payments is a designated percentage of the prime interest rate of any specified bank at the time of benefit determination. At the time of the change in interest assumption in the instant case, the prime rate was running up to almost nine percentage points higher than Moody's Corporate Bond Rate. (*See* Doc. No. 85, App. II to Ex. C).

The Seventh Circuit effectively accepted Respondents' suggestion that this is not an issue which can be decided on a motion for summary judgment contrary to the decisional law of other Circuits. In every opinion cited by Petitioners *supra* which was decided on the basis of the arbitrary and capricious standard, summary judgment was granted in favor of the defendant plans and plan administrators.

B. The Plan Administrator's Choice of Moody's Bond Index Was Not Erroneous on a Question of Law.

Respondents contended below that the arbitrary and capricious standard was inapplicable to a determination of the propriety of the Plan Administrator's choice of the bond index, despite the fact that Petitioners cited authority directly on point as to the applicability of this standard, *Lewis v. Fulton Federal Savings and Loan Association Pension Retirement Plan*, (Slip op., App. C at C-37). Respondents believe that they need only prove that the Plan Administrator's action was erroneous on a question of law; i.e., that the choice of the bond index resulted in a violation of the vesting provisions of ERISA, 29 U.S.C. § 1053.

Respondents' allegations of a violation of ERISA's vesting are completely without merit, however, for those provisions are irrelevant here. Respondents have confused the "nonforfeitability" requirement of ERISA with the prohibition of § 204(g), 29 U.S.C. § 1054(g), against a reduction in accrued benefits. The D.C. Court of Appeals, in *Stewart v. National Shopmen Pension Fund*, 730 F.2d 1552, 1561-62 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 834 (1984), provided a concise explanation of the difference between these two concepts based upon the decisions of this Court in *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 372-73 (1980) and *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 512 (1981):

> To begin with, the plaintiffs fail to distinguish between the concepts of 'vested rights' and 'accrued benefits,' a distinction drawn by Congress in writing the statute. The two principles are related, but different. An employee is 'vested' in a portion of his benefit when he has a *nonforfeitable* right to a given percentage of his *accrued benefit*. The 'vesting schedule' specifies the time at which an employee obtains his nonforfeitable right to a particular percentage of his accrued benefit. *It does not provide any formula or schedule for determining the amount of the accrued benefit. Thus, 'vesting' governs when an employee has a right to a pension; 'accrued benefit' is used in calculating the amount of the benefit to which the employee is*

> *entitled.* The distinction between the two terms was recognized by the Supreme Court in *Nachman*, . . . 446 U.S. at 372-73, 100 S.Ct. at 1731-32 [and] [i]n its subsequent decision in *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 101 S.Ct. 1895, 68 L.Ed.2d 402 (1981), the Court reemphasized the difference. . . . (footnotes omitted) (emphasis added).

In accordance with the foregoing, Petitioners were entitled to summary judgment as a matter of law under Count II of Respondents' Third Amended Complaint and they respectfully urge this Court to reverse the Seventh Circuit's remand of this Count to the district court for further proceedings.

III.

RESPONDENTS SUBMITTED NO EVIDENCE, ADMISSIBLE OR OTHERWISE, TO CONTRADICT PETITIONERS' EVIDENCE THAT THE PLAN ADMINISTRATOR DISCHARGED ITS DUTIES IN ACCORDANCE WITH ITS RESPONSIBILITIES UNDER SECTION 404(a) OF ERISA, AND THEREFORE, PETITIONERS WERE ENTITLED TO SUMMARY JUDGMENT UNDER COUNT III OF RESPONDENTS' COMPLAINT AS A MATTER OF LAW.

Respondents contended in Count III of their Third Amended Complaint that because one *effect* of the change in the interest assumption used to calculate the actuarial equivalence of lump-sum payments may be to reduce the amount that American would be required to contribute to its Plan in the future, a violation of the "exclusive benefit" rule of ERISA § 404(a) occurred, 29 U.S.C. §§ 1104(a). This is not the law; *see Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981).

Respondents have proffered no evidence, and indeed there is none, that in instituting the change in the actuarial assumption, American intended to reduce its contributions to the Plan. In their affidavits, Doc. No. 85, Ex. O through S, each of the individual members of the Pension Benefits

Administration Committee specifically denied that the purpose of the change in the actuarial assumption was to reduce American's contributions to its Plan. Each of these members stated that the purpose of the change in the interest rate assumption was to maintain compliance with the express provisions of the Plan. *Id.* These affidavits are credible and unrefuted. *See Czyz v. General Pension Board*, 578 F.Supp. 126, 130 (W.D. Pa. 1983). The deposition testimony of American Airlines Vice President, Thomas F. Quinn, Jr. and the Plan Administrator's consulting actuary, Ken E. Polk, also affirm this fact. (Doc. No. 85, Ex. T and U).

Respondents' contention that American was improperly motivated in making the change is self-serving conjecture. Such speculation cannot create a genuine issue for trial. *Merit Motors, Inc. v. Chrysler Corp.*, 569 F.2d 666 (D.C.Cir. 1977). In fact, when asked during their depositions whether they had any evidence whatsoever that members of the Pension Benefits Administration Committee had done anything wrong or that American effectuated the change *in order to reduce its contributions*, Respondents consistently responded that they did not. (Doc. No. 85, Ex. V containing extracts from depositions of representative Plaintiffs). Furthermore, the affidavit of actuary Willard Hartman states that the change in the actuarial assumption inured to the benefit of Plan participants. (Doc. No. 85, Ex. C).

On similar facts, the court in *Lewis v. Fulton Federal Savings and Loan Association Pension Retirement Plan*, (Slip op., App. C at C-33 to 38), unequivocally held that a change in actuarial assumptions made by a plan administrator in order to maintain actuarially equivalent payment options did not constitute a breach of the plan administrator's fiduciary duty. In fact, the *Lewis* decision suggests that a failure by the plan administrator to make such a change would constitute a breach of fiduciary duty. *Id.* That is because the plan administrator is required by ERISA to act for the exclusive benefit of *all* participants of a plan and not merely for the benefit of a few retirees seeking excessive payouts in contravention of a Plan's purpose and design.

In *Dhayer v. Weirton Steel Division*, 571 F.Supp. 316, 326 (N.D. W. Va. 1983), *aff'd, Sutton v. Weirton Steel*, 724 F.2d 406 (4th Cir. 1983), *cert. denied*, 467 U.S. 1205 (1984), the court assumed that "avoiding future pension obligations was the sole motivation of National, as alleged by Plaintiffs" and granted summary judgment in favor of the employer. The Seventh Circuit agrees that summary judgment is proper, even in a case involving conflicting questions of motive and intent, "where the plaintiff presents no indications of motive and intent supportive of his position." *Munson v. Friske*, 754 F.2d 683, 690 (7th Cir. 1985). Respondents have submitted no evidence to support their claims of improper motivation. Therefore, Petitioners were entitled to summary judgment as a matter of law under Count III of Respondents' Third Amended Complaint and they respectfully urge this Court to reverse the Seventh Circuit's remand of this Count to the district court for further proceedings.

IV.

PETITIONERS WERE ENTITLED TO SUMMARY JUDGMENT AS A MATTER OF LAW WITH RESPECT TO RESPONDENTS' REQUEST FOR INJUNCTIVE RELIEF IN COUNT IV OF THEIR THIRD AMENDED COMPLAINT.

Respondents sought in the Fourth Count of their Third Amended Complaint to enjoin Petitioners from implementing and enforcing the changes of interest assumption with respect to them. The issuance of an injunction presupposes a judicial determination that American's current computation of the lump-sum benefit is unlawful in some respect. For the reasons previously argued, such a showing cannot be made. Moreover, an injunction is not a proper remedy here, for Respondents' claims involve a one-time transaction, the receipt of their retirement benefits. Accordingly, Petitioners were entitled to summary judgment under Count IV as a matter of law.

CONCLUSION

The Court of Appeals' decision, with respect to Counts II and III of Respondents' Third Amended Complaint that a genuine issue for trial had been raised solely on the basis of inadmissible expert testimony is in conflict with the decisions of other Circuit Courts of Appeal. This decision should not be allowed to stand, for permitting courts to rely upon inadmissable evidence in summary judgment proceedings will emasculate the purpose of and standards applicable to summary judgment and rules of evidence. Moreover, with respect to Count II, the admissible and uncontradicted evidence submitted by Petitioners established that the American Plan Administrator's use of the independent bond index to compute actuarially equivalent lump sums was not arbitrary or capricious, the applicable standard of review. Nor did the choice of the bond index constitute an erroneous dicision on a question of law, the interpretation of Section 203 of ERISA. With respect to Count III, Respondents failed to submit sufficient admissible evidence to contradict Petitioners' evidence that the Plan Administrator discharged its duties in accordance with Section 404(a) of ERISA. Finally, with respect to Count IV, Respondents were entitled to no injuctive relief in this case. Therefore, Petitioners were entitled to summary judgment under Counts II through IV of Respondents' Third Amended Complaint and the Court of Appeals should have affirmed the district court's decision as to these counts.

In accordance with the foregoing, Petitioners respectfully request that a writ of certiorari issue to review the decision

of the Court of Appeals for the Seventh Circuit with respect to Counts II through IV of Respondents' Third Amended Complaint.

Respectfully submitted,

AMERICAN AIRLINES, INC., ET AL.

By: _____
Russell M. Pelton

RUSSELL M. PELTON,
Counsel of Record,

M. PATRICIA CHAPIN
PAULETTE J. CUSICK
PETERSON, ROSS,
SCHLOERB & SEIDEL
200 East Randolph Drive
Suite 7300
Chicago, Illinois 60601
(312) 861-1400
Attorneys for Petitioners

APPENDIX A
(Opinions and Judgments Below)

In the

United States Court of Appeals

For the Seventh Circuit

No. 85-1830

ROY E. DOOLEY, JR., et al.,

Plaintiffs-Appellants,

v.

AMERICAN AIRLINES, INC.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 81 C 6770—**James B. Parsons**, *Judge.*

ARGUED FEBRUARY 27, 1986—DECIDED AUGUST 5, 1986

Before WOOD, JR., FLAUM and RIPPLE, *Circuit Judges.*

RIPPLE, *Circuit Judge.* The appellants, retired pilots of American Airlines, brought this four count complaint pursuant to the Employee Retirement Income Security Act (ERISA). They sought to enforce their rights under an American Airlines defined benefit pension plan. The district court, on cross-motions for summary judgment, held that the alleged ERISA violations were unfounded. Accordingly, the court entered judgment in favor of the appellees on all four counts. While we agree with the district court's disposition of Count I, we disagree with its disposition of Counts II through IV. Therefore, we affirm the district court's judgment in part, and we reverse that judgment in part and remand this case for further proceedings.

I

This is an action brought under the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1132(a), to recover benefits and enforce rights under the terms of the American Airlines, Inc. Fixed Income Plan of the Pilot Retirement Income Program (Plan). The plaintiffs-appellants are fifty-eight retired pilot employees for American Airlines (Pilots). The defendants, all of whom are sued in their capacity as ERISA-defined fiduciaries, include 1) American Airlines, Inc., 2) the Plan, and 3) five individual members of American's Pension Benefits Administration Committee (collectively American).

The Plan is a "defined benefit pension plan" which provides that, upon retirement at age 60, a pilot employee is entitled to receive a Basic Retirement Annuity consisting of a monthly pension equal to 1.25% of the employee's final average compensation multiplied by a number equal to one less than the number of years of the employee's credited service. Reduced to its essentials, this means that an employee is entitled to receive a monthly annuity-like payment from the Plan. However, at the time of this litigation, a pilot employee was not *required* to receive his retirement in the usual annuity form. Instead, pilot employees were also entitled, pursuant to section 10.4 of the Plan, to select payment in one of a number of optional forms. This litigation focuses on the Plan's administration of only one of section 10.4's optional payment plans.

In this case, the Pilots chose to receive their retirement benefits in the form of a lump-sum payment. While that option was not specifically provided for in the actual plan document, payments in that form were nonetheless authorized by the document. Section 10.4(c) of the Plan provided:

> (c) *Open Option.* A member may elect, if the Administrator consents thereto on the basis of policies uniformly applicable to all Members similarly situated, to receive his or her Basic Retirement Annuity . . . in an optional form other than one specifically provided in this Section. . . .

Appellants' Br. at 6. Pursuant to this section, American Airlines issued Bulletin No. 547-78 on October 26, 1978. That Bulletin provided that American Airlines:

> and the Allied Pilots Association have agreed to allow lump-sum distributions at retirement from the Pilot Retirement Benefit Plan. This form of payment would be granted under the Open Option and is offered in addition to the various forms of payment currently provided under the Plan.

R.85, Ex. B. The Bulletin continued by explaining a number of preconditions to an employee's acceptance of payments under the lump-sum option. Furthermore, and more importantly for our purposes, the Bulletin also specifically stated that:

> Distributions will be based on the annual benefit otherwise provided under the Plan multiplied by a lump-sum annuity factor. The factor is developed using an 8½% interest rate and the 1971 Group Annuity Mortality Table.

Id. Thus, at its inception, the lump-sum option had a stated 8½% fixed actuarial assumption. That assumption was used to discount to present value the total amount of payments that an employee would have otherwise received if he had selected the annuity option.

The fixed-rate actuarial assumption remained in effect for slightly more than one year. Then, on December 26, 1979, American Airlines issued Bulletin No. 497-79 which discontinued the fixed rate and, instead, adopted a floating actuarial assumption computed as 1% greater than the Moody's AAA Corporate Bond Rate for the second month preceding the employee's retirement date.[1] R.85, Ex. D. According to the Bulletin, "[t]he purpose of this revision

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[1] This change came just ten months after the Internal Revenue Service issued Rev. Rul. 79-90, 1979-1 C.B. 156. That Ruling informed pension plans that their actuarial assumptions must be specified in the plan itself.

[was] to conform such interest rate to currently prevailing interest rates and to the Company's expectation for return on investment of pension assets for the intermediate term, that is, the term over which the series of payments would be made." *Id.* Shortly thereafter, this new policy was slightly modified. In Bulletin No. 161-80, issued on April 22, 1980, American Airlines 1) altered some of the preconditions for lump-sum payment, 2) changed the relevant Moody's AAA Corporate Bond Rate from the second to the third month preceding the employee's retirement, and 3) initiated a policy of "phasing in" the new floating rate by upwardly adjusting the 8½% fixed rate by 2% each month until it overtook the "Moody's + 1" rate. R.85, Ex. E.

The dispute in this case centers on American Airlines' change in the actuarial assumption from the 8½% fixed rate to the "Moody's + 1" floating rate. According to the Pilots, between February 1981 and October 1982 the relevant Moody's rate ranged from a low of 12.12% to a high of 15.49%; therefore, the "Moody's + 1" rate peaked at a high of 16.49%. Appellants' Br. at 8. Because of this shift in interest rate, retirees during this period received a much smaller lump-sum payment than those individuals who retired while the 8½% fixed rate was still in effect. As a result, the Pilots brought this four count action in the district court. Count I asserts that American's change to the floating interest assumption constituted an amendment to the Plan which resulted in a reduction of accrued benefits in violation of ERISA § 204(g), 29 U.S.C. § 1054 (g).[2] Count II asserts, in the alternative, that the floating interest rate was unreasonably high during the relevant time period and, therefore, resulted in lump-sum benefits which were less than actuarially equivalent to the normal retirement annuity. This deficiency, according to the

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[2] ERISA § 204(g), 29 U.S.C. § 1054(g), then provided:

> The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan, other than an amendment described in section 1082(c)(8) of this title.

appellants, created a violation of the vesting provisions of ERISA § 203, 29 U.S.C. § 1053.[3] Count III is premised on the theory that 1) increases in the interest assumption lead to reductions in lump-sum benefits, and 2) reductions in lump-sum benefits lead to substantially smaller contributions to the Plan on the part of the employer, American Airlines. Given these linkages, Count III alleges that the change in the actuarial interest rate assumption was motivated by the Plan fiduciaries' desire to benefit economically American Airlines in violation of ERISA § 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A),[4] which requires fiduciaries to discharge their duties solely in the interest of the Plan's participants and beneficiaries. Finally, Count IV seeks injunctive relief to prevent the continuation of the activities alleged in the previous three counts.

The district court, ruling on the Pilots' motion for summary judgment on Count I and American's cross-motion for summary judgment on Counts I through IV, found in favor of the defendants. The district court held that:

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[3] ERISA § 203, 29 U.S.C. § 1053, provides, in part:

> Each pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age and in addition shall satisfy the requirements of paragraphs (1) and (2) of this subsection.
>
> (1) A plan satisfies the requirments of this paragraph if an employee's rights in his accrued benefit derived from his own contributions are nonforfeitable.

[4] ERISA § 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A), provides:

> (1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—
>
> (A) for the exclusive purpose of:
>
> (i) providing benefits to participants and their beneficiaries; and
>
> (ii) defraying reasonable expenses of administering the plan.

> The Plan in question specifically provides that any alternative form of payment must be "actuarially equivalent" to a retiree's Basic Retirement annuity. "Actuarially equivalent" is defined in the Plan as "the equivalent in value on the basis of actuarial factors approved from time to time by American Airlines."
>
> * * *
>
> [Therefore, the] defendants' change in the discount interest rate did not constitute a "plan amendment" under ERISA and did not cause an unlawful reduction in plaintiffs' retirement benefits.

Dooley v. American Airlines, Inc., No. 81 C 6770, slip op. at 5-6 (N.D. Ill. Apr. 17, 1985) [hereinafter Order]. Relying on this basis, the district court found for the defendants on Count I. The court continued by stating:

> The Plan required that the lump sum payment be actuarially equivalent to the retirees' Basic Retirement annuity. The defendants' action served to insure actuarial equivalence. Accordingly, the defendants are not guilty of violating their fiduciary duties. Rather, I find that the defendants exercised good judgment in instituting the variable rate which will provide actuarial equivalence between available options.

Id. at 6. Based on these findings, the district court also found for American on Counts II and III. Additionally, since Count IV was derivative of the other three counts, and since the other three had been resolved in favor of American, the district court found in favor of American on Count IV. This appeal followed.

II

A. COUNT I

Count I deals with the alleged violation of ERISA § 204(g), 29 U.S.C. § 1054(g).[5] That statute provides, in pertinent

[5] In 1984, section 204(g) was amended by adding the following language:

(Footnote continued on following page)

part, that "[t]he accrued benefit of a participant under a plan may not be decreased by an amendment of the plan. . . ." Thus, the essential elements of a section 204(g) violation are: 1) a plan amendment, and 2) a reduction in accrued benefits. Since we agree with American that no plan amendment occurred in this case, we need not reach—and voice no opinion concerning—whether, if there were a plan amendment in this case, it would have served to reduce an employee's accrued benefits.

American contends that, assuming that the actuarial assumptions in this case can be construed as part of the employee benefit plan,[6] there was no ERISA § 204(g) violation because there was no plan amendment. To support this position, American first refers this court to the ac-

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[5] *continued*

> For purposes of [the preceding] paragraph . . ., a plan amendment which has the effect of—
>
> (A) eliminating or reducing an *early retirement benefit* or a retirement-type subsidy (as defined in regulations), or
>
> (B) eliminating an *optional* form of benefit,
>
> with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits. In the case of a retirement-type subsidy, the preceding sentence shall apply only with respect to a participant who satisfies (either before or after the amendment) the preamendment conditions for the subsidy. The Secretary of the Treasury may by regulations provide that this subparagraph shall not apply to a plan amendment described in subparagraph (B) (other than a plan amendment having an effect described in subparagraph (A)).

29 U.S.C. § 1054(g) (emphasis added). This amendment became effective for plan years beginning after December 31, 1984—well after the relevant time period in this case. Therefore, the amendment has no direct relationship on the result of our case.

[6] The parties have briefed and argued whether the actuarial assumptions—contained, as they were, in bulletins which were physically distinct from the pension plan document—can be construed as part of the pension plan for purposes of ERISA. Because of our disposition of this case, we need not reach that question.

tual pension document. Section 10.4 of the plan—the section under which the lump-sum payment was authorized—stated: "Any optional form of Basic Retirement Annuity elected pursuant to this Section shall be the Actuarial Equivalent of an annuity payable for the lifetime of the Member only in an annual amount equal to such Basic Retirement Annuity. . . ." Thus, section 10.4 can be fairly read as imposing a requirement that all optional forms of pension payments must be actuarially equivalent to the standard annuity form of payment. Additionally, Article II of the pension document (the article which defines the terms which will be used throughout the document) defines "actuarial equivalent" as "the equivalent in value on the basis of actuarial factors *approved from time to time by American Airlines*. . . ." Article II, § (d) (emphasis added). Therefore, by putting both of these provisions together, American contends that the pension plan administrators—by changing the actuarial assumption from the 8½% fixed rate to the "Moody's + 1" floating rate—were merely exercising a provision *which was already in the pension plan*. Accordingly, there could be no "plan amendment" because the administrators were merely carrying-out the provisions of the plan as it then stood.

American has supplied case law support for its position. In *Stewart v. National Shopmen Pension Fund*, 730 F.2d 1552 (D.C. Cir. 1984), the District of Columbia Circuit discussed the appropriate meaning of "plan amendment." Dealing with ERISA §§ 203(c)(1)(B) and 204(g), the court noted that:

> In both sections, the word "amendment" is used as a word of limitation. Congress did *not* state that any change would trigger the two provisions; it stated that any change *by amendment* would do so. The district court found, and the plaintiffs admit, that there was no "amendment" to the plan in the "technical" sense—*i.e.*, an actual change in the provisions of the plan. True. All that happened was that § 2.09, a provision already incorporated into the plan, was *applied*. Actions authorized by the plan were carried out by the persons authorized to do so.

730 F.2d at 1561 (emphasis in original). In *Stewart*, the court was faced with a multi-employer pension fund. That pension fund specifically provided that if an employer's participation in the fund should terminate, the fund's trustees were empowered to cancel any portion of an employee's pension which was based on the employee's service with that particular employer prior to the time that the employer joined the multi-employer fund.[7] While the *Stewart* decision is factually distinguishable from the present case, its commonsensical rule of law is nonetheless applicable here. In the context of this particular pension plan, the plan fiduciaries had the authority to change the actuarial assumptions "from time to time" in an effort to maintain actuarial equivalence. That is precisely what they did in this case. Therefore, we are unwilling to contort the plain meaning of "amendment" so that it includes the valid exercise of a provision which was already firmly ensconced in the pension document.

In rebuttal, the Pilots argue that the Plan, by allowing this type of employer discretion in the setting of actuarial assumptions, was violative of ERISA. Therefore, they contend that we should disregard the Plan's discretionary provision as a matter of public policy. In this respect, the Pilots place their primary reliance on ERISA § 402(b)(4), 29 U.S.C. § 1102(b)(4), and Internal Revenue Code § 401 (IRC § 401), 26 U.S.C. § 401.

ERISA § 402(b)(4) provides that: "Every employee benefit plan shall—(4) specify the basis on which payments are made to and from the plan." Similarly, Treasury Regulation 1.401-1(b)(1)(i) requires that, for a plan to be qualified

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[7] Notably, such a provision is both contemplated by and specifically approved of in ERISA. *See* ERISA § 203(a)(3)(E), 29 U.S.C. § 1053(a)(3)(E). The *Stewart* court recognized this point when it stated: "To give trustees the flexibility necessary for efficient operation of pension funds, Congress has recognized and provided for several situations in which plans can reduce or eliminate benefits to participants by implementing preexisting plan provisions." 730 F.2d at 1563 (footnote omitted).

under IRC § 401, the plan must provide for "definitely determinable benefits." This latter requirement is met when the level of employee benefits is computed via a fixed formula and "*is not within the discretion of the employer.*" *See* Rev. Rul. 74-385, 1974-2 C.B. 130. Accordingly, since IRC § 401's "definitely determinable benefits" requirement is, in some respects, parallel to the ERISA § 402(b)(4) requirement (plan must specify the basis upon which payments are to be made), the Pilots would like to incorporate into ERISA, by analogy, the decisions under IRC § 401 which prohibit employer discretion in the establishment of employee benefit computational formulae.

Specifically, the Pilots would like to rely on Rev. Rul. 79-90, 1979-1 C.B. 156. That ruling, issued to explain the "definitely determinable benefits" requirement of Reg. 1.401-1(b)(1)(i), provides:

> Whenever the amount of a benefit in a defined benefit plan is to be determined by some procedure (such as "actuarial equivalent", "actuarial reserve", or "actuarial reduction") which requires the use of actuarial assumptions (interest, mortality, etc.) *the assumptions to be used must be specified within the plan in a manner which precludes employer discretion.*

(Emphasis added.) Therefore, to qualify as an IRC § 401 pension, a plan must eliminate employer discretion from the establishment of its actuarial assumptions. The Pilots would like us to impose this obligation on American Airlines. We decline the Pilots' invitation to take this step.

Since the IRS believed that Rev. Rul. 79-90 was a novel decision, the IRS devised a plan for phasing-in its effectiveness. For pension plans in existence on March 12, 1979 (the date of Rev. Rul. 79-90), the Ruling would first become effective for plan years beginning on or after December 31, 1983. For plans which were not in existence on March 12, 1979, the Ruling would become immediately effective. Finally, even if a plan's existence pre-dated March 12, 1979, if that plan already included its actuarial assump-

tions (i.e.: if the plan unwittingly complied with the revenue ruling) those assumptions could *not* be removed.

There can be no question either that the Plan was in existence on March 12, 1979 or that, on that date, the Plan was not in compliance with the employer discretion prohibitions contained in Revenue Ruling 79-90. Furthermore, there is no doubt that the IRS gave non-complying pension plans until December 31, 1983—well after the relevant time frame in this case—to come into compliance with its new ruling. Given this grace period, and given the fact that the IRS' section 401 treasury regulations and revenue rulings are neither incorporated into ERISA, *see* 29 U.S.C. § 1202(c), nor binding on us in this situation, *see Carle Foundation v. United States*, 611 F.2d 1192, 1195 (7th Cir. 1979), we see no reason to immediately impose upon American a provision with which it was given years to comply.

Accordingly, we affirm the decision of the district court insofar as it granted summary judgment for the appellees with respect to Count I.

B. COUNTS II THROUGH IV

Count II alleges that the new actuarial figure set by American Airlines (the "Moody's + 1" rate) did not, in fact, achieve actuarial equivalence and, therefore, violated ERISA § 203, 29 U.S.C. § 1053. Count III alleged that the pension plan's fiduciaries breached their duty by increasing the interest assumption in order that American Airlines (neither a plan participant nor a beneficiary) would be economically benefited. Both of these counts are closely related and both turn upon whether the plan fiduciaries appropriately set the new, floating-rate interest factor. In granting summary judgment in favor of the appellees on Counts II and III, the district judge apparently concluded that "[t]he defendants' action [in changing the interest assumption] served to insure actuarial equivalence." Order at 6. We believe that this factual finding was inappropriate given the summary judgment posture of this case.

Summary judgment may be granted only if the record indicates "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). As we stated in *Munson v. Friske*, 754 F.2d 683, 690 (7th Cir. 1985) (citations omitted):

> In reviewing a summary judgment, an appellate court must view the entire record and the inferences drawn therefrom in the light most favorable to the party opposing the motion. If a study of the record reveals that inferences contrary to those drawn by the trial court might be permissible, then the summary judgment should be reversed.

In this case, the appellants were able to raise a material issue of fact regarding the actuarial appropriateness of setting the interest assumption at the "Moody's + 1" rate. One of the appellants' experts, Mr. Carl H. Fischer, stated, as follows, in his affidavit:

> *Actuarial Equivalence of Lump Sum Distributions.* In my professional opinion, actuarial equivalence must be determined on the basis of reasonable actuarial assumptions, consistently applied, including a reasonable interest assumption. Reasonableness implies a range and there is, therefore, no single interest rate which, alone, constitutes the reasonable interest assumption for purposes of actuarial equivalence. In my opinion, during the period from February, 1981, through September, 1982, during which most of the plaintiffs retired:
>
> (a) 8½% was, and continued to be, well within the range of reasonable interest assumptions for purposes of determining the actuarial equivalence of lump sum distributions.
>
> (b) The highest reasonable interest rate for purposes of determining actuarial equivalence of lump sum distributions was the rate promulgated by the Pension Benefit Guaranty Corporation for valuing immediate annuities, which rate, during the period in question, ranged from a low of 9¾% to a high of 11%.

> (c) During a period of high volatility in market rates of interest, a variable interest rate, indexed to a standard intended to reflect current market rates of interest, with no provision for eliminating the extremes of the fluctuations through averaging or some other technique, does not provide a reasonable interest assumption for purposes of determining the actuarial equivalence of lump sum distributions.
>
> (d) A variable interest rate, one percentage point greater than the Moody's Aaa Corporate Bond Rate for the third month prior to retirement, was not, during the period in question, a reasonable basis for determining actuarial equivalence of lump sum distributions under the American [Airlines] Plan.

R.106 at 33-34. In his deposition, Mr. Fischer also often repeated his belief that an interest assumption, in order that it accurately result in an actuarially equivalent amount in times of fluctuating interest rates, must incorporate some form of averaging which will moderate large, short-term changes in the current market interest rate. R.117, Ex. W at 12, 13, 20, 21, 22. This testimony provided sufficient evidence, especially in light of the rather incomplete record on this point, to create a disputed issue of material fact. Accordingly, we reverse the district court's grant of summary judgment on Counts II and III, and we remand this case for further record development and proceedings. Additionally, since Count IV (seeking injunctive relief against the conduct which forms the basis for Counts I through III) is closely related to and, in part, derivative of Counts II and III, we reverse the grant of summary judgment on that count also and we remand it along with the other two counts.[8]

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[8] We leave it to the district court to determine, in the first instance, whether any or all of the appellants' releases are valid and enforceable.

III

In sum, we hold that summary judgment in favor of the appellees was appropriate with respect to Count I since there was no plan amendment. Accordingly, we affirm the district court's judgment with respect to Count I. However, with respect to Counts II through IV, we find that resolution of these three counts requires additional findings on a disputed issue of material fact. Therefore, we reverse the district court's grant of summary judgment and we remand this case for further proceedings. Each party will bear its own costs of this appeal.

AFFIRMED IN PART, REVERSED AND REMANDED IN PART.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

No. 81 C 6770

In the

United States District Court

FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ROY E. DOOLEY, JR., et al.,

Plaintiffs,

v.

AMERICAN AIRLINES, INC., et al.,

Defendants.

MEMORANDUM OPINION AND ORDER

Plaintiffs, who are 58 recently retired airline pilots, filed a four-count complaint against their former employer, American Airlines, Inc., its pilot pension plan, and the Plan fiduciaries to recover damages for an alleged illegal reduction of their lump sum pensions. Both parties are in agreement as to the pertinent facts. American Airlines administers a retirement benefit program for its pilots which consists of two plans, the Variable Income Plan and the Fixed Income Plan. When a pilot retires from American Airlines he is eligible to draw benefits from both Plans. Under the Fixed Income Plan, a retiring pilot is entitled to a lifetime annuity. The retiring pilot may elect to receive his payment as a joint and survivor annuity, a ten-year guaranteed payment, a "level income" payment or under an "open option". It was under the "open option" that the 58 plaintiffs elected to receive their benefits in a lump sum payment.

On October 26, 1978 the lump sum option was adopted. American Airlines notified its employees of the "lump sum" option through a bulletin which indicated that the lump sum

benefit would be a payment equal to the annual benefit yet multiplied by a lump sum annuity factor based on a discount interest rate of 8½% and the 1971 Group Annuity Mortality Table.

In December of 1979 American Airlines decided to change its formula for computing lump sum benefits. A second bulletin was posted on April 22, 1980 indicating that effective January 1, 1981, the Plan would use a variable interest rate to compute lump sums paid out of the Fixed Income Plan. The new rate would be a fluctuating rate calculated by adding an additional percentage point to the interest rate set by Moody's Aaa Corporate Bond Rate. The bulletin also indicated that there would be a phase-in period whereby commencing in February 1981 monthly increments of 2% would be added to the then existing rate of 8.5% until the Moody's-plus-one rate was reached.

Count I of plaintiffs' third amended complaint is brought under § 502(a)(1)(B) of ERISA. Specifically plaintiffs allege that the purpose and effect of defendant American Airlines' unilateral discontinuance of the 8½% interest assumption and substitution of a variable interest rate indexed to Moody Aaa corporate bond rate in computing lump sum distributions under defendants' Plan was to increase substantially the rate of interest used in determining the lump sum distribution entitlement of participants retiring on and after February 1, 1981. Plaintiffs further allege that as a result of the increased assumption, the aggregate dollar amounts of lump sum distributions to which participants of defendant Plan retiring on or after February 1, 1981 are entitled are substantially less than such participants would have received had such distributions continued to be computed on the basis of the 8½% interest assumption previously used: Plaintiffs assert that defendants' unilateral change in the interest assumption constituted an amendment to the Plan having the effect of decreasing the participants' accrued rights in violation of § 204(g) of ERISA, 29 U.S.C. § 1054(g).

Count II of plaintiffs' third amended complaint is brought under section 502(a)(1)(B) of ERISA (29 U.S.C. §§ 1132(a)(1)(B) as amended). In Count II plaintiffs assert that the interest assumption adopted by the defendants is unreasonably high and that as a result of the increased interest assumption, the lump sum distributions paid to participants of defendants' Plan retiring on and after February 1, 1981, including plaintiffs, are not actuarially equivalent to the Basic Retirement annuities such participants otherwise were entitled to receive. Plaintiffs therefore assert violations of defendants' Plan and section 203 of ERISA (29 U.S.C. 1053 as amended).

Count III of plaintiffs' third amended complaint is brought under sections 502(a)(2) and 409(a) of ERISA (29 U.S. §§ 1132(a)(2) and 1109(a)) as amended and alleges a breach of defendant American and individual defendants' fiduciary duties to defendant Plan, its participants and beneficiaries. Specifically plaintiffs allege that the change in interest assumption was conceived and implemented by defendants for the purpose of profiting defendant American through reduced contributions to the Plan in order to divert funds to its own corporate purposes.

Count IV of plaintiffs' third amended complaint is brought under section 502(a)(3) of ERISA (29 U.S.C. § 1132(a)(3) as amended) and seeks to enjoin defendants from implementing and enforcing the change in interest assumption or any other change in interest assumption which decreases accrued benefits against plaintiffs. Count IV also seeks attorney's fees and costs.

The motions which are currently before me are the motion of the plaintiffs for summary judgment on Count I of their third amended complaint and the cross-motion of the defendants for summary judgment on Counts I-IV of the plaintiffs' third amended complaint. The sole issue remaining in this case is a question of law which is appropriate for summary judgment. Specifically the question of law before

the court is whether defendants' conduct constituted a violation of ERISA.

The Plan in question specifically provides that any alternative form of payment must be "actuarially equivalent" to a retiree's Basic Retirement annuity. "Actuarially equivalent" is defined in the Plan as "the equivalent in value on the basis of actuarial factors approved from time to time by American Airlines." The maintenance of actuarial equivalence is an obligation imposed upon defendants by specific provisions of the Plan. Administrative changes in the interest rates are mandatory under the Plan and are the means of maintaining actuarial equivalence. As stated in *Grand Union Co. and Independent Transportation Employees Assoc.*, 82 ARB ¶8843 (June 2, 1982),

> When money can be invested at a higher rate of interest, it requires a smaller lump sum to fund a future stream of retirement benefits, and the fall of the lump sum option dollar amount was a "mathematical fact of life"—freezing the interest rate would have produced a lump sum windfall.

The administrators of the Plan were charged with the responsibility of acting for the benefit of all participants of the Plan. I am persuaded by defendants' memorandum and the United States District Court for the Northern District of Georgia Atlanta Division's decision in *Lewis v. Fulton*, No. C82-736A slip opinion (N.D. Ga. Aug. 31, 1983) that defendants' change in the discount interest rate did not constitute a "plan amendment" under ERISA and did not cause an unlawful reduction in plaintiffs' retirement benefits. I am not persuaded by plaintiffs' arguments regarding Revenue Rulings 79-90 1979-1 LB. 155 and 81-D, 1981-1 C.B. 228. I will adopt the findings of the Georgia District Court regarding these Revenue rulings.

I therefore find that defendants are entitled to summary judgment on Counts I-IV of plaintiffs' third amended complaint. The fact that the dollar amounts of the lump sum

option payments may have fallen as a result did not change the Plan or participants' rights under the plan. The Plan required that the lump sum payment be actuarially equivalent to the retirees' Basic Retirement annuity. The defendants' action served to insure actuarial equivalence. Accordingly, the defendants are not guilty of violating their fiduciary duties. Rather, I find that the defendants exercised good judgment in instituting the variable rate which will provide actuarial equivalence between the available options.

The plaintiffs' motion for summary judgment is hereby denied. The defendants' motion for summary judgment on Counts I-IV of the plaintiffs' third amended complaint is granted. It is so ordered.

ENTER:

James B. Parsons

April 17, 1985

APPENDIX B

Statutes and Rules Involved

Section 203 of ERISA, 29 U.S.C. § 1053

§ 1053. Minimum vesting standards

(a) Nonforfeitability requirements

Each pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age and in addition shall satisfy the requirements of paragraphs (1) and (2) of this subsection.

(1) A plan satisfies the requirements of this paragraph if an employee's rights in his accrued benefit derived from his own contributions are nonforfeitable.

(2) A plan satisfies the requirements of this paragraph if it satisfies the requirements of subparagraph (A), (B), or (C).

(A) A plan satisfies the requirements of this subparagraph if an employee who has at least 10 years of service has a nonforfeitable right to 100 percent of his accrued benefit derived from employer contributions.

(B) A plan satisfies the requirements of this subparagraph if an employee who has completed at least 5 years of service has a nonforfeitable right to a percentage of his accrued benefit derived from employer contributions which percentage is not less than the percentage determined under the following table:

Years of service:	Nonforfeitable percentage
5	25
6	30
7	35
8	40

Years of service:	Nonforfeitable percentage
9	45
10	50
11	60
12	70
13	80
14	90
15 or more	100

(C)(i) A plan satisfies the requirements of this subparagraph if a participant who is not separated from the service, who has completed at least 5 years of service, and with respect to whom the sum of his age and years of service equals or exceeds 45, has a nonforfeitable right to a percentage of his accrued benefit derived from employer contributions determined under the following table:

If years of service equal or exceed—	and sum of age and service equals or exceeds—	then the nonforfeitable percentage is—
5	45	50
6	47	60
7	49	70
8	51	80
9	53	90
10	55	100

(ii) Notwithstanding clause (i), a plan shall not be treated as satisfying the requirements of this subparagraph unless any participant who has completed at least 10 years of service has a nonforfeitable right to not less than 50 percent of his accrued benefit derived from employer contributions and to not less than an additional 10 percent for each additional year of service thereafter.

(3)(A) A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that it is not payable if the participant dies (except in the case of a

survivor annuity which is payable as provided in section 1055 of this title).

(B) a right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that the payment of benefits is suspended for such period as the employee is employed, subsequent to the commencement of payment of such benefits—

(i) in the case of a plan other than a multiemployer plan, by an employer who maintains the plan under which such benefits were being paid; and

(ii) in the case of a multiemployer plan, in the same industry, in the same trade or craft, and the same geographic area covered by the plan, as when such benefits commenced.

The Secretary shall prescribe such regulations as may be necessary to carry out the purposes of this subparagraph, including regulations with respect to the meaning of the term "employed".

(C) A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because plan amendments may be given retroactive application as provided in section 1082(c)(8) of this title.

(D)(i) a right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that, in the case of a participant who does not have a nonforfeitable right to at least 50 percent of his accrued benefit derived from employer contributions, such accrued benefit may be forfeited on account of the withdrawal by the participant of any amount attributable to the benefit derived from namdatory contributions (as defined in the last sentence of section 11054(c)(2)(C) of this title) made by such participant.

(ii) Clause (i) shall not apply to a plan unless the plan provides that any accrued benefit forfeited under a plan provision described in such clause shall be restored upon repayment by the participant of the full amount of the withdrawal described in such clause plus, in the case of a defined benefit plan, interest. Such interest shall be computed on such amount at the rate determined for purposes of section 1054(c)(2)(C) of this title (if such subsection applies) on the date of such repayment (computed annually from the date of such withdrawal). In the case of a defined contribution plan the plan provision required under this clause may provide that such repayment must be made before the participant has any 1-year break in service commencing after the withdrawal.

(iii) In the case of accrued benefits derived from employer contributions which accrued before September 2, 1974, a right to such accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that an amount of such accrued benefit may be forfeited on account of the withdrawal by the participant of an amount attributable to the benefit derived from mandatory contributions, made by such participant before September 2, 1974, if such amount forfeited is proportional to such amount withdrawn. This clause shall not apply to any plan to which any mandatory contribution is made after September 2, 1974. The Secretary of the Treasury shall prescribe such regulations as may be necessary to carry out the purposes of this clause.

(iv) For purposes of this subparagraph, in the case of any class-year plan, a withdrawal of employee contributions shall be treated as a withdrawal of such contributions on a plan year by plan year basis in succeeding order of time.

(E)(i) A right to an accrued benefit derived from employer contributions under a multiemployer plan

shall not be treated as forfeitable solely because the plan provides that benefits accrued as a result of service with the participant's employer before the employer had an obligation to contribute under the plan may not be payable if the employer ceases contributions to the multiemployer plan.

(ii) A participant's right to an accrued benefit derived from employer contributions under a multiemployer plan shall not be treated as forfeitable solely because—

(I) the plan is amended to reduce benefits under section 1425 or 1441 of this title, or

(II) benefit payments under the plan may be suspended under section 1426 or 1441 of this title.

(b) Computation of period of service

(1) In computing the period of service under the plan for purposes of determining the nonforfeitable percentage under subsection (a)(2) of this section, all of an employee's years of service with the employer or employers maintaining the plan shall be taken into account, except that the following may be disregarded:

(A) years of service before age 18, except that in the case of a plan which does not satisfy subparagraph (A) or (B) of subsection (a)(2) of this section, the plan may not disregard any such year of service during which the employee was a participant;

(B) years of service during a period for which the employee declined to contribute to a plan requiring employee contributions,[2]

(C) years of service with an employer during any period for which the employer did not maintain the plan or a predecessor plan, defined by the Secretary of the Treasury;

(D) service not required to be taken into account under paragraph (3);

(E) years of service before January 1, 1971, unless the employee has had a least 3 years of service after December 31, 1970;

(F) years of service before this part first applies to the plan if such service would have been disregarded under the rules of the plan with regard to breaks in service, as in effect on the applicable date; and

(G) in the case of a multiemployer plan, years of service—

(i) with an employer after—

(I) a complete withdrawal of such employer from the plan (within the meaning of section 1383 of this title), or

(II) to the extent permitted by regulations prescribed by the Secretary of the Treasury, a partial withdrawal described in section 1385(b)(2)(A)(i) of this title in connection with the decertification of the collective bargaining representative; and

(ii) with any employer under the plan after the termination date of the plan under section 1348 of this title.

(2)(A) For purposes of this section, except as provided in subparagraph (C), the term "year of service" means a calendar year, plan year, or other 12-consecutive month period designated by the plan (and not prohibited under regulations prescribed by the Secretary) during which the participant has completed 1,000 hours of service.

(B) For purposes of this section, the term "hour of service" has the meaning provided by section 1052(a)(3)(C) of this title.

(C) In the case of any seasonal industry where the customary period of employment is less than 1,000 hours during a calendar year, the term "year of service" shall be such period as determined under regulations of the Secretary.

(D) For purposes of this section, in the case of any maritime industry, 125 days of service shall be treated as 1,000 hours of service. The Secretary may prescribe regulations to carry out the purposes of this subparagraph.

(3)(A) For purposes of this paragraph, the term "1-year break in service" means a calendar year, plan year, or other 12-consecutive-month period designated by the plan (and not prohibited under regulations prescribed by the Secretary) during which the participant has not completed more than 500 hours of service.

(B) For purposes of paragraph (1), in the case of any employee who has any 1-year break in service, years of service before such break shall not be required to be taken into account until he has completed a year of service after his return.

(C) For purposes of paragraph (1), in the case of any participant in an individual account plan or an insured defined benefit plan which satisfies the requirements of subsection 1054(b)(1)(F) of this title who has 5 consecutive 1-year breaks in service, years of service after such 5-year period shall not be required to be taken into account for purposes of determining the nonforfeitable percentage of his accrued benefit derived from employer contributions which accrued before such 5-year period.

(D)(i) For purposes of paragraph (1), in the case of a nonvested participant, years of service with the employer or employers maintaining the plan before any period of consecutive 1-year breaks in service shall not be required to be taken into account if the number of consecutive 1-year breaks in service within such period equals or exceeds the greater of—

(I) 5, or

(II) the aggregate number of years of service before such period.

(ii) If any years of service are not required to be taken into account by reason of a period of breaks in service to which clause (i) applies, such years of service shall not be taken into account in applying clause (i) to a subsequent period of breaks in service.

(iii) For purposes of clause (i), the term "nonvested participant" means a participant who does not have any nonforfeitable right under the plan to an accrued benefit derived from employer contributions.

(E)(i) In the case of each individual who is absent from work for any period—

(I) by reason of the pregnancy of the individual,

(II) by reason of the birth of a child of the individual,

(III) by reason of the placement of a child with the individual in connection with the adoption of such child by such individual, or

(IV) for purposes of caring for such child for a period beginning immediately following such birth or placement,

the plan shall treat as hours of service, solely for purposes of determining under this paragraph whether a 1-year break in service has occurred, the hours described in clause (ii).

(ii) The hours described in this clause are—

(I) the hours of service which otherwise would normally have been credited to such individual but for such absence, or

(II) in any case in which the plan is unable to determine the hours described in subclause (I), 8 hours of service per day of absence,

except that the total number of hours treated as hours of service under this clause by reason of such pregnancy or placement shall not exceed 501 hours.

(iii) The hours described in clause (ii) shall be treated as hours of service as provided in this subparagraph—

(I) only in the year in which the absence from work begins, if a participant would be prevented from incurring a 1-year break in service in such year solely because the period of absence is treated as hours of service as provided in clause (i); or

(II) in any other case, in the immediately following year.

(iv) For purposes of this subparagraph, the term "year" means the period used in computations pursuant to paragraph (2).

(v) A plan may provide that no credit will be given pursuant to this subparagraph unless the individual furnishes to the plan administrator such timely information as the plan may reasonably require to establish—

(I) that the absence from work is for reasons referred to in clause (i), and

(II) the number of days for which there was such an absence.

(c) Plan amendments altering vesting schedule

(1)(A) A plan amendment changing any vesting schedule under the plan shall be treated as not satisfying the requirements of subsection (a)(2) of this section if the nonforfeitable percentage of the accrued benefit derived from employer contributions (determined as of the later of the date such amendment is adopted, or the date such amendment becomes effective) of any employee who is a participant in the plan is less than such nonforfeitable percentage computed under the plan without regard to such amendment.

(B) A plan amendment changing any vesting schedule under the plan shall be treated as not satisfying the requirements of subsection (a)(2) of this section unless each participant having not less than 5 years of service is permitted to

elect, within a reasonable period after adoption of such amendment, to have his nonforfeitable percentage computed under the plan without regard to such amendment.

(2) Subsection (a) of this section shall not apply to benefits which may not be provided for designated employees in the event of early termination of the plan under provisions of the plan adopted pursuant to regulations prescribed by the Secretary of the Treasury to preclude the discrimination prohibited by section 401(a)(4) of Title 26.

(3) The requirements of subsection (a)(2) of this section shall be deemed to be satisfied in the case of a class year plan if such plan provides that 100 percent of each employee's right to or derived from the contributions of the employer on his behalf with respect to any plan year are nonforfeitable not later than the end of the 5th plan year following the plan year for which such contributions were made. For purposes of this part, the term "class year plan" means a profit sharing, stock bonus, or money purchase plan which provides for the separate nonforfeitability of employees' rights to or derived from the contributions for each plan year.

(d) Nonforfeitable benefits after lesser period and in greater amounts than required

A pension plan may allow for nonforfeitable benefits after a lesser period and in greater amounts than are required by this part.

(e) Nontreatment of accrued benefit as nonforfeitable; calculation of present value

(1) If the present value of any accrued benefit exceeds $3,500, such benefit shall not be treated as nonforfeitable if the plan provides that the present value of such benefit could be immediately distributed without the consent of the participant.

(2) For purposes of paragraph (1), the present value shall be calculated by using an interest rate not greater than the interest rate which would be used (as of the date of the

distribution) by the Pension Benefit Guaranty Corporation for purposes of determining the present value of a lump sum distribution on plan termination.

Amendments made by Retirement Equity Act of 1984, Pub.L. 98-397 are the following:

(1) Subsection (b)(1)(A)—§ 102(b) of Pub.L. 98-397 substituted "18" for "22";

(2) Subsection (b)(3)(C)—§ 102(c)(1) of Pub.L. 98-397 substituted "5 consecutive 1-year breaks in service" for "any 1-year break in service";

(3) Subsection (b)(3)(D)—§ 102(d)(2) of Pub.L. 98-397, designated existing provisions as cl. (i), in cl. (i) as so designated substituted "a nonvested participant" for "a participant who, under the plan, does not have any nonforfeitable right to an accrued benefit derived from employer contributions," substituted "with the employer or employers maintaining the plan before any consecutive 1-year breaks in service" for "before any 1-year break in service," designated the material beginning "the aggregate number of years" as subcl. (II), added subcl. (I), struck out "Such aggregate number of years of service before such break shall be deemed not to include any years of service not required to be taken into account, under this paragraph by reason of any prior break in service," and added cls. (ii) and (iii);

(4) Subsection (b)(3)(E)—§ 102(e)(2) of Pub.L. 98-397, added subpar. (E); and

(5) Subsection (e)—§ 105(a) of Pub.L. 98-397 added subsec. (e).

1980 Amendment. Subsection (a)(3)(E)—§ 303(1) of Pub.L. 96-364, added subpar. (E).

(6) Subsection (b)(1)(G)—§ 303(2)(4) of Pub.L. 96-364, added subpar. (G).

29 U.S.C.A. § 1053 (West 1985).

Section 404(a)(1)(A) of ERISA, 29 U.S.C. § 1104(a)(1)(A)

§ 1104. Fiduciary duties

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan. . . .

Rule 56 of the Federal Rules of Civil Procedure

Rule 56. Summary Judgment

(a) For claimant

A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For defending party

A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and proceeding thereon

The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together

with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case not fully adjudicated on motion

If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of affidavits; further testimony; defense required

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so

respond, summary judgment, if appropriate, shall be entered against him.

(f) When affidavits are unavailable

Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits made in bad faith

Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Rule 702 of the Federal Rules of Evidence

Rule 702. Testimony by Experts

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

APPENDIX C

Relevant Unreported Decisions

C-1

Civil Action No. 84-400-MA

United States District Court

FOR THE DISTRICT OF MASSACHUSETTS

October 17, 1986, Decided

MARGO LYNCH, PPA DENNIS LYNCH,
DENNIS LYNCH AND MARGARET LYNCH,

Plaintiffs

v.

MERRELL-NATIONAL LABORATORIES DIVISION
OF RICHARDSON-MERRELL, INC.,

Defendant

MEMORANDUM AND ORDER

Mazzone, D.J.

This matter is before the Court on the defendant's motion for summary judgment. The case involves a claim for damages brought by the parent on behalf of a minor plaintiff, Margo Lynch, and individually as well, against the defendant Merrell-National Laboratories ("Merrell Dow"). The plaintiffs allege that Margo Lynch sustained injury in the form of the congenital absence of her right forearm as a result of the ingestion of the defendant's prescription pharmaceutical, Bendectin, by plaintiff's mother, Margaret Lynch, during her pregnancy. In support of its motion for summary judgment, the defendant has filed an extensive record, consisting of excerpts of deposition and trial testimony of nineteen expert witnesses, numerous Bendectin epidemiological studies, and an appendix containing a list of other Bendectin cases, an index of the Bendectin multidistrict litigation including juror questionnaires, instructions, special questions and an exhaustive and thoughtful ruling by the trial judge in that litigation denying the plaintiffs' motions for judgment notwithstanding the verdict

and for new trial. The plaintiffs have opposed the motion and have supported their opposition with a memorandum.

The two issues are: (1) whether the Plaintiffs are collaterally estopped from relitigating the issue of Bendectin's role in the causation of birth defects; and (2) whether there is any factual dispute on the issue of causation. As to the first issue, the defendants claim the plaintiffs should be bound by the result of the multidistrict trial in which the jury concluded that Bendectin did not cause human birth defects. The plaintiffs say that because they did not participate in that trial, they are not bound by that result, and further, that the result is not conclusive because other cases have produced a different result favorable to them. As to the second issue, the defendant says that even if the plaintiffs were not bound by the results of the earlier trial, the plaintiffs' proof on the issue of causation is insufficient as a matter of law to establish causation. The plaintiffs say that their evidence, consisting of a re-analysis of epidemiological studies, in vivo and in vitro animal studies, and studies of analogous chemical structures create an issue of fact for the jury. A brief review of the history of this litigation follows.

Bendectin, a product manufactured by the defendant for use in the treatment of nausea and vomiting during pregnancy, has been the subject of numerous cases in which it has been alleged that Bendectin was the cause of human birth defects. In 1982, in order to deal with the volume of Bendectin cases, the Judicial Panel on Multidistrict Litigation assigned Chief Judge Carl B. Rubin of the United States District Court for the Southern District of Ohio, to handle pretrial proceedings in the Bendectin multidistrict litigation. In re Richardson-Merrell, Inc. "Bendectin" Prod. Liab. Litig. (II), MDL No. 846, 533 F. Supp. 489 (Jud. Pan. Mult. Lit. 1982). The panel found that the cases involved common questions of fact and that centralization of these actions pursuant to Section 1407 would "best serve and promote the just and efficient conduct of the litigation." The panel found that common factual questions arose from the allegations in

each action that birth defects were caused by the mother's ingestion of Bendectin and that centralization was "necessary in order to prevent duplication of discovery, avoid inconsistent pretrial rulings, and conserve the resources of the parties, their counsel and the judiciary." Transfer Order of the Judicial Panel on Multidistrict Litigation No. 486, February 9, 1982.

Upon completion of multidistrict discovery, Judge Rubin consolidated for trial all cases originally filed in the Northern and Southern Districts of Ohio, and adopted an "opt-in" procedure, allowing plaintiffs in cases filed in other districts to participate in the proceedings upon application of plaintiffs' counsel. Approximately 1174 plaintiffs were represented at that trial. For reasons not clear in the record, the plaintiffs in the present case, although participating in the multidistrict discovery, elected not to participate in the trial. They chose instead to have their case returned to this court for a separate proceeding.

The large number of cases involved in the consolidated trial required unusual and innovative procedures. To assist counsel in their jury selection, the standard jury questionnaire form was supplemented by an additional questionnaire, designed jointly by all counsel. The additional questionnaire was mailed to prospective jurors and returned before the beginning of trial. Based upon an examination of that second questionnaire and by agreement of counsel, some prospective jurors were excused. The jury ultimately selected was composed of five women and one man. The presentation of evidence at the consolidated trial required a total of 21 days, and nothing suggests that the trial was anything but capably and skillfully handled by Judge Rubin and trial counsel. Ten expert witnesses were presented on behalf of the defendant. Plaintiffs required 41 hours 15 minutes to present their case both on direct, cross and rebuttal, while the defendant required 31 hours, 30 minutes to Present its case on direct and on cross. Final argument and instruction consumed an additional day. After deliberations, the jury

returned a unanimous verdict in favor of Merrell-Dow. The jury unanimously answered in the negative the following special interrogatory:

Have the plaintiffs established by a preponderance of the evidence that ingestion of Bendectin at therapeutic doses during the period of fetal organogenesis is a proximate cause of human birth defects?

Judge Rubin denied a motion for judgment notwithstanding the verdict. In re: Richardson-Merrell, Inc. Bendectin Products, 624 F. Supp. 1212 (S.D. Ohio 1985). The plaintiffs' appeal is pending. On March 12, 1985, Judge Rubin ordered that those cases that did not elect to become part of the consolidated litigation be returned to the originating court "for such further proceedings as may be appropriate."

The case is now before this Court for further proceedings. In a nutshell, the plaintiffs in the present case seek to relitigate the issue of whether Bendectin causes human birth defects. Plaintiffs here assert that they should not be precluded from relitigating this issue because they were not named parties in the consolidated trial, nor were they in "privity" with any parties to that proceeding. They claim that they had no financial or proprietary interest in the consolidated case, nor did they supply an attorney or in any manner exercise control over that litigation. Furthermore, plaintiffs claim that the exercise of their discretionary right not to intervene in the earlier, consolidated litigation, should not preclude the assertion of their claim here and that they would be denied their constitutional right to a trial if they were precluded. I turn, then, to the first question: whether the doctrine of collateral estoppel should be invoked under these facts to preclude plaintiffs from relitigating the issue of Bendectin's alleged responsibility for human birth defects.[1]

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[1] In three other cases, separate judgments on jury verdicts have been entered at the trial court level for Merrel-Dow in suits alleging birth defects caused by Bendectin. See *Mekdeci* v.

(footnote continued on next page)

II.

The doctrine of collateral estoppel, and the related doctrine of res judicata, may function to prevent the relitigation in subsequent actions of an issue or issues decided in earlier actions.[2] Collateral estoppel, or issue preclusion, may protect litigants from the burden of relitigating an identical issue with the same party or his privy, and serve to promote judicial economy through the prevention of needlessly repetitive litigation. *Parklane Hosiery Co.* v. *Shore,* 439 U.S. 322, 326 (1979). The doctrine has generally been applied against persons who were either parties to a prior suit or in privity with such parties. Plaintiffs assert that collateral estoppel should only be applied against persons who were either parties to a prior suit or in strict privity with such parties.

The plaintiffs' argument is not without merit. In *United States* v. *Mendoza,* 464 U.S. 154, 158-159 n.3, 4, 5, the Supreme Court said:

Under the judicially developed doctrine of collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision is conclusive in a subsequent

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(footnote continued from preceding page)

Merrell-National Labs., No. 77-255 (M.D. Fla.), aff'd. 711 F.2d 1510 (11th Cir. 1983); *Cordova* v. *Philips Roxane Labs.,* No. 432-656 (Cal. Super. June 24, 1985); *Will* v. *Richardson-Merrell, Inc.,* No. CV-484-118 (S.D. Ga. June 27, 1986). In *Oxendine* v. *Richardson-Merrell, Inc.,* No. 1245-82 (D.C. Super. Sept. 1, 1983), the trial judge entered judgment notwithstanding the verdict in favor of the plaintiff, but that ruling was reversed on appeal. A Petition for rehearing is pending.

[2] Under res judicata, it is the claim itself that is precluded. Here the Lynches' claims were never litigated, but the issue was. Hence, this memorandum speaks in terms of collateral estoppel, although the distinction between the two doctrines appears to be a blurred one at times. *Kremer* v. *Chemical Construction Corp.,* 456 U.S. 461, 480-481 n.22 (1982); *Nevada* v. *United States,* 463 U.S. 110, 128-130 n.11 (1982); *Gerrard* v. *Larsen,* 517 F.2d 1127, 1134 (8th Cir. 1975).

suit based on a different cause of action involving a party to the prior litigation. *Montana* v. *United States,* 440 U.S. 147, 153 (1979). Collateral estoppel, like the related doctrine of res judicata,[3] serves to "relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication." *Allen* v. *McCurry,* 449 U.S. 90, 94 (1980). In furtherance of those policies, this Court in recent years has broadened the scope of the doctrine of collateral estoppel beyond its common-law limits. Ibid. It has done so by abandoning the requirement of mutuality of parties. *Blonder Tongue Laboratories, Inc.* v. *University of Illinois Foundation,* 402 U.S. 313 (1971), and by conditionally approving the "offensive" use of collateral estoppel by a nonparty to a prior lawsuit. Parklane Hosiery, supra. [4]In *Standefer* v. *United States,* 447 U.S. 10, 24 (1980), however, we emphasized the fact that Blonder-Tongue and Parklane Hosiery involved disputes over private rights between private litigants. We noted that "(i)n such cases, no significant harm flows from enforcing a rule that affords a litigant only one full and fair opportunity to litigate an issue, and that there is no sound reason for burdening the courts with repetitive litigation." 447 U.S. at 24. Here, as in *Montana* v. *United States,* supra, the

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[3]Under res judicata, a final judgment on the merits bars further claims by parties or their privies on the same cause of action. *Montana* v. *United States,* 440 U.S. at 153; *Parklane Hosiery Co.* v. *Shore,* 439 U.S. 322, 326 n.5 (1979). The Restatement of Judgments speaks of res judicata as "claim preclusion" and of collateral estoppel as "issue preclusion." Restatement (Second) of Judgments 27 (1982).

[4]Offensive use of collateral estoppel occurs when a plaintiff seeks to foreclose a defendant from relitigating an issue the defendant has previously litigated unsuccessfully in another action against the same or a different party. Defensive use of collateral estoppel occurs when a defendant seeks to prevent a plaintiff from relitigating an issue the plaintiff has previously litigated unsuccessfully in another action against the same or a different party. Parklane Hosiery, supra, at 326 n.4.

party against whom the estoppel is sought is the United States; but here, unlike in Montana, the party who seeks to preclude the Government from relitigating the issue was not a party to the earlier litigation." [5]In Mendoza, the Court disapproved the application of the doctrine of collateral estoppel to the government, but noted that in a companion case, *United States* v. *Stauffer Chemical Co.,* 464 U.S. 165 (1983), the doctrine was applied to the government under certain circumstances when the parties to the two lawsuits were the same.

This Circuit has spoken earlier with caution on this issue. *Griffin* v. *Burns,* 570 F.2d 1065, 1072 (1st Cir. 1978) absence of privity prevents collateral estoppel. But certain inroads have been made upon the rule of mutuality); *Walsh* v. *International Longshoremen's Association,* AFL-CIO, 630 F.2d 864, 874 (1st Cir., 1980) (if the jurisdictional questions in the two cases are the same, relitigation of the issue is barred by collateral estoppel); *General Foods* v. *Massachusetts Department of Public Health,* 648 F.2d 784, 790 (1st Cir. 1981) (rejecting doctrine of virtual representation).

More recently, this Circuit has applied the doctrine of collateral estoppel under certain circumstances. Pignons S.A. *de Mechanique* v. *Polaroid Corp.,* 701 F.2d 1 (1st Cir. 1983). In that case, the court said:

> Pignons had a fair opportunity to make these arguments and to introduce this evidence the first time. The law requires the courts to offer Pignons nothing more, for collateral estoppel implements "the principle that one opportunity to litigate an issue fully and fairly is

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[5]In Montana we held that the Government was estopped from relitigating in federal court the constitutionality of Montana's gross receipts tax on contractors of public construction firms. That issue has previously been litigated in state court by an individual contractor whose litigation had been totally financed and controlled by the Federal Government. *Montana* v. *United States,* supra, at 151, 155; see n.9, infra.

enough." *Continental Can Co.* v. *Marshall,* 603 F.2d 590, 594 (7th Cir. 1979). Once a plaintiff has had a chance to prove a fact, he cannot reopen the matter simply by stating that he wishes to introduce more or better evidence.

See also *Fiumara* v. *Fireman's Fund Insurance Companies,* 746 F.2d 87-92 (1st Cir. 1984) (the significant question is whether a party has had a full and fair opportunity for judicial resolution of the same issue); *O'Reilly* v. *Malon,* 747 F.2d 820 (1st Cir. 1984) (the party is not entitled to more than one full and fair opportunity for judicial resolution of the same issue).

Other circuits have invoked the doctrine of collateral estoppel when, as in this case, a plaintiff has elected as a matter of litigation strategy to forego an opportunity to intervene in an action. In National Wildlife *Fed'n* v. *Gorsuch,* 744 F.2d 963 (3rd Cir. 1983), the Third Circuit held that collateral estoppel was properly invoked against plaintiffs who, though not parties to an earlier action, bypassed an opportunity to intervene in the earlier action. Like the plaintiffs in Gorsuch, the plaintiffs here "were not outsiders unaware of litigation in progress that would ultimately affect their interests." Gorsuch, 744 F.2d at 971-72. In *Bronson* v. *Board of Educ.,* 525 F.2d 344 (6th Cir. 1975), the Court of Appeals for the Sixth Circuit refused to allow relitigation of racial discrimination claims by new plaintiffs following an earlier action on the same issues brought by different plaintiffs, noting that it would be inequitable to require the defendant school board to repeatedly battle the "same charge of improper conduct if it has been vindicated in an action brought by a person or group who validly and fairly represent those whose rights are alleged to have been infringed." Bronson, 525 F.2d at 349.

In *Gerrard* v. *Larsen,* 517 F.2d 1127, 1135 (8th Cir. 1975), the court stated that the determination of who should be bound by a prior adjudication ought to be conducted "on a case by case basis by an examination of underlying facts and

circumstances rather than by reliance solely upon the formal status of persons against whom an estoppel is asserted."

Finally, there is some respected authority that where there has been adequate litigation, the virtual representation theory may play a narrow role. 18 Wright, Miller Cooper, Federal Practice and Procedure 4457 at 502 (1981). See also *Crane* v. *Commissioner of Department of Agriculture, Food and Natural Resources,* 602 F. Supp. 280 (D. Me. 1985). Other commentary provides a checklist to determine whether collateral estoppel is appropriate:

1. Is the issue identical to the issue in the first action?

2. Was the precise issue actually litigated and decided by the factfinder in the first action?

3. Considering all the objections, motions and rulings which related to this issue, was it finally judicially determined in the first action?

4. Was the judgment in the first action actually dependent on the determination of this issue?

21 Federal Procedure Lawyers Edition 51:212.

This somewhat extensive review was necessary, first, to illustrate the evolution of the doctrine of collateral estoppel and its application, and secondly, to decide whether the doctrine should be applied here. After examination of the underlying facts and circumstances of this case, I conclude that the plaintiffs here should be bound by the results of the consolidated trial.

The issue of causation with respect to Bendectin and birth defects was extensively litigated in the consolidated trial, and the outcome of that litigation should be accorded finality. The claims by plaintiffs in the consolidated trial were representative of all potential claims involving birth defects allegedly caused by the maternal ingestion of Bendectin, and all of the opinion witnesses designated by plaintiffs in this

case testified at the consolidated trial. The plaintiffs here unconvincingly argue that their claim differs from those in the consolidated trial. They emphasize that a trial before this Court would focus on the specific incident of Margaret Lynch's ingestion of Bendectin. But the central issue in any Proceeding involving Bendectin and its role in birth defects is that of causation, and that issue has already been fully litigated in the consolidated trial.

If this case were to be tried, there would be no reason to depart from the careful, thoughtful and fair procedure adopted by Judge Rubin in the earlier trial. Bifurcation would certainly be appropriate. Fed. R. Civ. P. 42(b). The jury's attention should be focused quickly and without distraction if both sides are to receive a fair resolution. The issue is complex; approximately 19 experts would be expected to testify, and the 4 cases tried to date lasted an average of 38 trial days. The jury would be selected in the same manner, employing the same questionnaire and voir dire procedures, and receiving essentially the same instructions. Margo Lynch would not be present in the courtroom, although she could observe the proceedings from the adjoining lobby by electronic means. The jury would be instructed at the outset that while the immediate issue was a medical-legal one, the case involved real people and birth deformity. Therefore, this would not be a mere "academic debate between the medical and scientific experts for each side," as the plaintiffs describe the consolidated trial. The plaintiffs attribute the defendant's verdict in the consolidated trial to the fact that "no individual cases were discussed" or that "confronted with the causation issue in a vacuum, the jury returned a verdict for the defendant." Not only does this argument belittle the jury's role, but it demonstrates the plaintiffs' hope that the presence of Margo Lynch in the courtroom would produce a different and favorable result. This is a case in which there would be no new medical or scientific evidence, no new expert opinion, no new studies, no new data or theories. The plaintiffs point out that a plaintiff's verdict was returned in *Oxendine* v. *Richardson-Merrell*,

506 A.2d 1100 (D.C.C.A. 1986), but that state court trial did not have the full record of the consolidated trial, nor was the case tried under the same procedures. It produced the very inconsistency which the doctrine of collateral estoppel was designed to prevent.

The plaintiffs' constitutional arguments are not persuasive. A significant commonality of interest, sufficient to overcome the plaintiffs' due process objections, existed between the Lynches and the more than 1100 Plaintiffs participating in the consolidated trial. The "opt-in" procedure adopted by Judge Rubin was not a commitment that every out-of-state plaintiff would receive a separate jury trial. Under the multidistrict litigation panel's orders, the case could not be transferred for trial, but only for pre-trial proceedings. The cases involving plaintiffs who chose not to participate in the consolidated trial were returned to the originating court for appropriate proceedings. As stated earlier, the record is silent as to the reasons plaintiffs elected not to participate in the consolidated trial. Were the record to reflect a worthy explanation, a lack of confidence in trial counsel, or a compelling distinction between the Lynches' claims and the others, I would have analyzed the doctrine in that light. But the plaintiffs have not provided a single sound reason for their decision. One permissible inference is that the plaintiffs elected not to participate because they felt they would not be bound by a defendants' verdict, but could take advantage of a plaintiffs' verdict by negotiating a favorable settlement or, ironically, by asserting issue preclusion or offensive collateral estoppel against the defendant. This would be the type of tactical or procedural maneuvering that should be discouraged and not rewarded. Imagine the consternation of the over 1100 plaintiffs involved in the prior litigation if the plaintiffs here were allowed to obtain an inconsistent adjudication by nothing more than a change in forum.

I am not unmindful of the harshness this ruling visits on the plaintiffs. But what it boils down to is that the plaintiffs want a second chance. Conclusiveness of adjudication is an

important principle. Justice is achieved when a competent jury hears all the relevant and material evidence by competent witnesses on the issue, presented by able, competent counsel, and returns a unanimous verdict. That was achieved in the prior trial and I conclude the plaintiffs here are bound by that result.

III.

The second assertion by the defendant in support of its motion for summary judgment is that the plaintiffs' proof on the issue of causation is insufficient to permit a reasonable trier of fact to conclude that Bendectin caused Margo Lynch's birth defect. Because of the extensive proceedings conducted in the consolidated trial before Judge Rubin, this Court is able to conduct a review of all of the evidence available to the parties with respect to the issue of Bendectin's causal rule in human birth defects. All of the evidence which might provide reliable support for an opinion as to whether Bendectin causes birth defects is in possession of the parties and is before the Court. In any trial, the same evidence would be presented to the factfinder. After a thorough review of the records of prior testimony, expert depositions and affidavits, and available scientific studies, I conclude that, even if the plaintiffs were not collaterally estopped from litigating the issue, the plaintiffs have failed to show that they can Provide admissible evidence on the issue of causation sufficient to permit a reasonable trier of fact to conclude that Bendectin caused Margo Lynch's birth defect. [6]At the outset, this Court must recognize that despite recent

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[6] I understand that this finding is, in some respects, contradictory to the District of Columbia Court of Appeals holding in *Oxendine* v. *Merrell Dow Pharmaceuticals,* 506 A.2d 1100 (D.C. App. 1986). The issues addressed here, however, differ from the issues addressed in the Oxendine appeal. The Oxendine court did not directly address the issue of admissibility of certain evidence and testimony presented by the plaintiff. This Court examines the admissibility of the plaintiffs' evidence and opinion testimony with respect to the Federal Rules of Evidence

(footnote continued on next page)

advances in the field of teratology, the causation of most birth defects remains unknown. This has been admitted by plaintiffs' own expert, Dr. Alan K. Done, who has testified that the causation of 75 to 80 percent of birth defects is unknown (Done Oxendine) Dep. 322; Done (Mekdeci) Tr. 1971; Done (Koller) Dep. 105-107),[7] and that 95 percent of limb reduction defects, the type suffered by Margo Lynch, are of unknown origin. (Done (Oxendine) Dep. 327). None of the plaintiffs' witnesses claim that there is a scientific or medical consensus that Bendectin causes birth defects. Dr. Done has admitted that "obviously" there is not complete agreement that Bendectin is teratogenic. (Done (Koller) Dep. 107).

In support of its summary judgment motion, the defendant notes that more studies have been done of Bendectin than of any other drug used in pregnancy, and the defendant has collected and submitted more than 25 human epidemiological studies concerning Bendectin which have been published in the scientific literature.

Epidemiological studies rely on "statistical methods to detect abnormally high incidences of disease in a study population and to associate those incidences with unusual exposures to suspect environmental factors." Done, "A Commentary on the Use of Epidemiological Evidence in Demonstrating Cause-In-Fact." 7 Harv. Envtl. Rev. 429, 431 (1983).

(footnote continued from preceding page)

and examines the admissibility of evidence and testimony in light of applicable federal case law decided after argument of the Oxendine appeal.

[7] For the purposes of this Memorandum and Order, I have adopted a citation form for the depositions and transcripts similar to the form used by the defendants in their motion for summary judgment. The citation refers to the expert testifying, then provides the abbreviated case name in parentheses and the page number of the deposition or case transcript. The testimony referenced may be found in the defendant's Appendix II, Depositions and Trial Testimony.

The majority of epidemiological studies presented here are of two main types—cohort studies and case control studies. "Cohort" studies are those in which the incidence of birth defects among groups of persons exposed to Bendectin and groups of persons not exposed to Bendectin are compared. "Case control" studies start with a group of persons who have the birth defects in question ("cases"), match this group with another group (the "controls") not having the birth defects in question, and compare the frequency of exposure to the drug among the cases and the controls.

Several courts have recognized the important role epidemiological evidence may play in demonstrating causation of illness or disease. In the recent swine flu cases, courts consistently held that, in the absence of either epidemiological evidence or a scientific understanding of causation, a finding of causation must be rejected as speculative. See *Terrell* v. *United States,* 517 F. Supp. 374, 379 (N.D. Tex. 1981) ("epidemiological evidence is critical in discovering the etiology, or cause of diseases, particularly those which may have numerous causes") and *Iglarsh* v. *United States,* No. 79C2148, slip op. at 5 (N.D. Ill. Dec. 9, 1983) ("in the absence of a statistically valid epidemiological study, even the plaintiff's treating physicians, or any clinician for that matter, is unable to attribute a plaintiff's injury to the swine flu vaccination.").

Epidemiological studies on causation also played a major role in the recent "Agent Orange" litigation. In re "Agent — Orange" Prod. Liab. Litig., 611 F. Supp. 1221 (D.C.N.Y 1985). In that litigation, Judge Weinstein reviewed "a number of sound epidemiological studies" on Agent Orange, finding that these were "the only useful studies having any bearing on causation", id. at 1231, and concluding that "the epidemiological studies alone demonstrate that on the basis of present knowledge, there is no question of fact. Agent Orange cannot now be shown to have caused plaintiff's numerous illnesses." Id. at 1241.

This conclusion is equally true with respect to the epidemiological studies of Bendectin and Margo Lynch's birth defect. The epidemiological studies presented by the defendant, including eleven cohort studies and four case-control studies, indicate that there is no statistically significant association between Bendectin and birth defects. Also, none of the numerous published epidemiological studies of Bendectin has reported a statistically significant association between Bendectin and limb reduction defects. The cohort studies have not reported any disproportionate occurrence of limb reduction defects, and all of the case-control studies of limb reduction defects have failed to find any association with Bendectin usage.

The finding of these cohort and case-control studies have been confirmed by other epidemiological studies of population groups. A study by Dr. Steven H. Lamm indicates that, while Bendectin usage declined from more than 1 million new therapy starts in 1979 to zero in 1984, there was no change in the incidence of limb reduction defects. Thus, no connection between fluctuations in the use of Bendectin and the incidence of limb reduction defects has been demonstrated.

The several epidemiological studies of Bendectin also withstand a combined statistical analysis. Dr. Brian MacMahon computed a combined estimate of relative risk for ten of the cohort studies and found no statistically significant difference between the rate of birth defects among those exposed and those not exposed. Dr. MacMahon's results were replicated by Dr. Lamm in a similar study and, in an affidavit prepared for this case, Dr. Lamm has concluded that the "totality of the evidence of these studies does not indicate any increased risk of infants with congenital malformations among pregnancies with exposure to Bendectin."

The defendants have asked this Court to find, pursuant to Federal Rules of Evidence 401-403 and Federal Rule of Evidence 703, that the plaintiffs' Proposed opinion testimony

is inadmissible. Rules 401 and 402 require this Court to exclude evidence that does not conform to accepted scientific methodology and that is not of a type upon which experts could reasonably rely. Furthermore, under Rule 403, this Court must exclude relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Rule 703 requires that an expert, considering data not admitted into evidence, base his opinion only upon those data that are reasonably relied upon by experts in that particular field. In applying Rule 703, the Court "must focus not only on the kinds of information that experts in a particular field generally rely upon, but also on whether in the particular case before the Court and on the particular subject to which the expert testimony is addressed, facts or data not admissible in evidence can reasonably be relied upon by an expert witness." Saltzburg and Redden, Federal Rules of Evidence Manual (3d ed. 1982). Therefore, this Court must examine the evidence upon which the plaintiffs' opinion testimony will be based to determine whether it is of a type that is relied upon by experts in the field of teratology, and whether reliance on that evidence to explain Margo Lynch's specific birth defect is reasonable. The Court must also be mindful of whether the probative value of this evidence is sufficient to outweigh the potential danger of unfair prejudice, confusion of the issues, or misleading of a jury.

The plaintiffs seek to rely on four major types of evidence to support their opinion testimony that Bendectin was the cause of Margo Lynch's birth defect: re-analysis of the epidemiological studies presented by the defendant, in vivo and in vitro animal studies, and studies of analogous chemical structures.

As noted above, the epidemiological studies presented by the defendant indicate no statistically significant association between Bendectin and either birth defects generally or limb reduction defects in particular. The plaintiffs have presented

no epidemiological evidence indicating a statistically significant association between Bendectin and any type of birth defect, and none of the plaintiffs' witness has conducted a study of Bendectin and birth defects.

The only epidemiological evidence offered by the plaintiffs is a re-analysis by Dr. Shanna Swan, criticizing a study by Dr. Jose F. Cordero and Dr. Godfrey P. Oakley, Jr. of the Center on Disease Control, and attempting to realign the data in the original study to demonstrate a causal connection between Bendectin and birth defects. The defendant claims that Dr. Swan's study is methodologically flawed and untrustworthy in that it was conducted during litigation, was financed by plaintiffs' counsel, was prepared in substantial part by employees of plaintiffs' counsel, was developed without a written, objective protocol, and was initiated with an a prior understanding of what the likely results of the re-analysis would show. Dr. Swan has conceded that she was "potentially biased in performing this study." (Swan (MDL) Tr. 1059; Swan (Cordova) Tr. 2946-47).

Even if this Court were to find the methodology of Dr. Swan's re-analysis credible, this Court still could not accept result-oriented re-analysis of epidemiological studies and criticisms of others' methodology, such as that performed here by Dr. Swan, as reliable data upon which to base an opinion on causation. The plaintiffs cannot merely rely on criticisms of the defendant's studies to establish causation. The fallacy of such an attempt was recognized by the court in *Koller* v. *Richardson-Merrell, Inc.* which ruled in its February 25, 1983 order that the plaintiffs were "precluded from presenting alleged methodological flaws and other errors in epidemiological and animal studies in their case in chief unless plaintiffs can make a satisfactory showing that absent the flaws, the studies would affirmatively demonstrate that Bendectin is a teratogen at the appropriate level of statistical significance." The plaintiffs have made no such showing in this case.

A second basis for plaintiff's opinion testimony are extrapolations from in vivo animal studies, in vitro animal studies, and studies done with chemical structures analogous to Bendectin. The in vivo studies relied upon by plaintiffs' experts are those in which dosages of Bendectin or doxylamine, a compound found in Bendectin, were administered to pregnant rats, rabbits, and monkeys. In vitro studies are those in which a chemical or drug were tested on something less than an intact, live pregnant animal. Several in vitro studies of Bendectin have been reported, including studies of the influence of Bendectin or doxylamine on frog nerve cells and rat brain cells. In the chemical structure studies, researchers attempt to draw conclusions concerning Bendectin through studies conducted on drugs which are chemically similar to Bendectin.

There are several limitations inherent in the use of the animal and other experimental data relied upon here by the plaintiffs, and these limitations have been conceded in prior testimony by plaintiffs' witnesses. Dr. Done, for example, has admitted that the fact that Bendectin may be teratogenic in a species of animals does not necessarily mean it will be teratogenic in humans. (Done (Oxendine) Tr. 942; Done (Koller) Dep. 78; Done (Oxendine) Tr. 684-685; Done (MDL) Tr. 464-65, 550-53, Done (Cordova) Tr. 1253-54). Dr. Michael Melnick has testified that, on the basis of animal studies, "one can only speak of birth defects in the animal — in the animal one has studied," (Melnick (Cordova) Tr. 1934-36, see Melnick (MDL) Tr. 1226-27, 1374-75), and Dr. Mark Edward Thoman has stated that animal studies "have to be taken in conjunction with the fact that there are differences between animals and the human." (Thoman (Koller) Dep. 71).

It is also difficult to extrapolate findings from animal studies to human studies because of the large doses used in the animal studies. Dr. William J. Scott has testified that almost any substance can be shown to be teratogenic at some does in some species. (Scott (MDL) Tr. 2179-80, Scott (Cordova) Tr. 5817-18). Dr. Done has recognized that if one

gives too much of virtually anything to a pregnant animal, malformation may be produced "if it makes the mother sick enough." (Done (Oxendine) Tr. 844; see Done (MDL) Tr. 541-42).

None of the animal studies submitted by the plaintiffs provide evidence of teratogenicity at does comparable to the human therapeutic dose of Bendectin. These animal studies are therefore lacking in probative value and must be found inadmissible. As Judge Weinstein explained in the Agent Orange litigation:

> There is no evidence that plaintiffs were exposed to the far higher concentrations involved in both the animal and industrial exposure studies. The animal studies are not helpful in the instant case because they involve different biological species. They are of so little probative value as to be inadmissible. See Fed.R.Evid. 401-403. They cannot be an acceptable predicate for an opinion under Rule 703.

In re "Agent Orange" Prod. Liab. Litig., 611 F. Supp. at 1241.

There is no evidence here that Margaret Lynch was exposed to the types of doses involved in the animal studies relied upon by the plaintiffs' experts, and studies conducted on rats, rabbits, and monkeys are not helpful and are of little probative value in this case. The animal studies of Bendectin are therefore inadmissible in this action and can neither form a basis for expert opinion nor create a genuine issue for trial.

For similar reasons, this Court must reject the plaintiffs' proffered evidence of in vitro studies and studies of analogous chemical structures as a basis for the plaintiffs' experts testimony. The in vitro studies suffer from the same deficiencies as the in vivo animal studies — they are Performed in other biological species and at doses far in excess of the human therapeutic doses. This Court also cannot find, pursuant to Rule 703, that such studies are "of a type

reasonably relied upon by experts in the particular field." Dr. John Hassell, the author of one such in vitro study, has expressly recognized that neither his technique nor any other in vitro system has yet been validated as an accurate predictor of teratogenicity in animals or humans. (See Defendant's App. III, Tab 40). Dr. Scott (Scott (Oxendine) Tr. 1958-66, Scott (MDL) Tr. 2202, Scott (Cordova) Tr. 5828-29) and Dr. Done (Done (Cordova) Tr. 881-82, 891-96) have also expressed their view that these tests have not yet been validated as useful screening tests of teratogenicity. Based on the in vitro studies, the plaintiffs' witnesses have generated many hypotheses as to the mechanisms by which Bendectin may cause birth defects, but these hypotheses are nothing more than speculation which might confuse and mislead a jury.

I find the studies of analogous chemical structures relied upon by plaintiffs' experts to be of even lesser probative value than the in vivo and in virto animal studies. Plaintiffs' witnesses have admitted that, despite similarity, the "chemically analogous' drugs to which Bendectin is compared are different in some respects from Bendectin and its components, and that these differences may affect its properties. (Crescitelli (MDL) Tr. 1570-75, 1644-45, 1653. Crescitelli (Cordova) Tr. 801-05; Done (MDL) Tr. 522-23). To accept the validity of these chemical structure studies, one must accept the premise that the drugs to which Bendectin is compared are, in fact, themselves teratogenic. Admission of such evidence at trial would necessitate "mini-trials" as to whether the chemically analogous drugs are indeed teratogenic.

As the plaintiffs' expert, Dr. Done, has stated, chemical structure analysis can only raise "suspicion" about potential teratogenicity and cannot be relied upon alone to show causation (Done (Oxendine) Tr. 1056; Done (MDL) Dep. 113). Due to the highly speculative nature of the chemical structure analogics, I must rule that such evidence does not comport with the requirements of Rule 703 that an expert's opinion

be grounded on facts or data of a type reasonably relied upon by experts in the particular field.

Thus, a careful review of the material before this Court indicates that the only relevant, probative, and non-misleading evidence on the issue of Benedectin's role in the causation of birth defects are the controlled observations of human beings, documented in more than 25 published epidemiological studies. The data from these studies do not indicate any statistically significant association between Bendectin and the type of birth defect suffered by Margo Lynch. This Court finds that the evidence submitted by the plaintiffs in support of their expert testimony does not comport with the requirements of the Federal Rules of Evidence. Absent admissible and competent expert testimony grounded on evidence comporting with the requirements of the Federal Rules of Evidence, the plaintiffs cannot raise a genuine issue of material fact concerning Bendectin's role in the causation of Margo Lynch's birth defect.

Conclusion

The plaintiffs are collaterally estopped from relitigating the issue of Bendectin's alleged role in the causation of birth defects, and the plaintiffs' proof on the issue of causation is insufficient to permit a reasonable trier of fact to conclude that Bendectin caused Margo Lynch's birth defect. The defendant's motion for summary judgment is granted and the complaint is to be dismissed.

SO ORDERED.

United States District Court

NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ARTHUR L. LEWIS and CAROLYN J. EMBRY,

Plaintiffs,

v.

FULTON FEDERAL SAVINGS AND LOAN ASSOCIATION PENSION RETIREMENT PLAN, et al.,

Defendants.

CIVIL ACTION

NO. C82-736A

ORDER

This case was tried to the court without a jury on May 31 - June 2, 1983. It is an action brought by plaintiffs Arthur L. Lewis and Carolyn J. Embry against defendants pursuant to the provisions of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), for lump sum benefits in excess of those offered by defendant Fulton Federal Savings and Loan Association Pension Plan Administrative Committee (the "Committee") and for other relief including interest, punitive damages and attorney fees. Following the close of evidence, the parties submitted their arguments by brief and also submitted proposed findings of fact and conclusions of law. The court has carefully considered the evidence, the briefs and proposed findings submitted by the parties, and hereby makes the following findings of fact and conclusions of law. Rule 52, Fed. R. Civ. P.

THE FACTS

1. Plaintiffs Lewis and Embry are former participants under the Fulton Federal Savings and Loan Association

Pension Retirement Plan (the "Plan"). Plaintiff Lewis was employed by Fulton Federal Savings and Loan Association for almost thirty years, and retired from that employment effective November 30, 1981. Plaintiff Embry was employed by Fulton Federal Savings and Loan Association for approximately 25 years and retired January 15, 1982.

2. The Plan (Plaintiff's Exh. 1) is administered by an "Administrative Committee" which is composed of employees of Fulton Federal Savings and Loan Association, the Plan's sponsor. Members of the Administrative Committee are appointed by the Directors of Fulton Federal Savings and Loan Association and serve at the pleasure of such directors. The members of the Plan Administrative Committee at all times pertinent to this controversy have been made parties defendant.

3. The funds of the Plan are invested and managed by Trustees (collectively referred to as the "Trustee") consisting of five individuals who are all directors of the Plan sponsor, Fulton Federal Savings and Loan Association. The Trustees likewise have been made parties defendant to this action.

4. The Plan which governs the Fulton Federal Pension Retirement Plan allows for the election by a Plan participant of various alternative forms of pension benefit payments, including a lump sum payment which is the "actuarial equivalent" of the periodic benefits which would otherwise and normally have been received in annuity form. Both plaintiffs elected the lump sum payment prior to retirement in accordance with the terms of the Plan.

5. Section 1.02 of the Plan defines the term "actuarial equivalent" as follows:

> Actuarial Equivalent: A benefit of equivalent value, but differing in form from a given benefit, computed on the basis of the mortality tables and interest rate last adopted for purposes of the actuarial evaluation used to determine contributions to the Plan, or on such other

basis as may be adopted by the [Plan Administrative] Committee.

6. Three items of information are necessary in order to compute an actuarially equivalent lump-sum benefit: (1) the amount of "normal" monthly annuity for the individual in question; (2) the life expectancy of the individual based upon mortality tables; and (3) an interest rate assumption with which to discount the future annuity stream of income back to present value.

7. The interest rate referred to in Section 1.02 is called the "actuarial interest assumption". This interest assumption is established from time to time by the Committee, with the advice of the actuaries, and is an approximation of what the Plan and its actuaries believe the Plan is going to earn on its investments over the life of the Plan. The interest rate so established is used in the actuarial calculations necessary for computing the annual employer contributions to the Plan.

8. Section 11.05 of the Plan, entitled "Actuarial Tables and Interest Rates" provides, in pertinent part, as follows:

> The Committee shall adopt from time to time tables for use in all actuarial calculations required in connection with the Plan, and shall establish from time to time, in accord with applicable law, the rate of regular interest which, compounded annually, shall be used in all actuarial calculations required in connection with the Plan. As an aid to the Committee in adopting tables and in fixing the rates of contribution payable to the Plan, the Actuary designated by the Committee shall make annual actuarial valuations of the contingent assets and liabilities of the Plan, and shall certify to the Committee the tables and rates of contribution which he recommends for use by the Committee.

9. The interest assumption last adopted pursuant to section 11.05 for purposes of the actuarial evaluation used to determine contributions to the Plan as of the effective date of retirement of plaintiffs Lewis and Embry was 6% per

annum. The 6% interest rate was not specified in the Plan, but was set by the Committee in its discretion in 1976, it being an assumed interest rate which, taken with other actuarial assumptions, was used for purposes of determining long-term funding needs of the Plan. The 6% interest rate was not intended to reflect prevailing market interest rates at any particular time and, at the time of the retirement of plaintiffs Lewis and Embry, the 6% interest rate was substantially less than the prevailing market interest rate.

10. In 1980 market interest rates began to rise dramatically and the Chairman of the Committee and the Actuary for the Plan consulted regarding the determination of a proper interest rate to be applied to lump sum payments. Their action in this regard was inspired by rising interest rates at a time when an employee made inquiries with respect to the lump sum option.

11. On April 14, 1980, the Actuary for the Plan recommended that the Committee adopt as its policy a procedure whereby actuarial assumptions used for calculating lump sum benefits would be consistent with the actuarial basis on which insurance company annuity purchase rates from time to time are determined. The recommendation was made because a series of lump sum payments using a below market discount assumption "could seriously damage the Plan's funding progress". Plaintiffs' Exh. 62.

12. On June 2, 1980, James C. Roberts, Chairman of the Plan Committee, made inquiries regarding the market rates on insurance company annuities for the purposes of determining what rate should be applied to lump sum settlements for participants in the Plan. Plaintiff's Exh. 64.

13. On December 15, 1980, the Committee adopted a policy of establishing an interest rate for lump sum payments as reflected in the following provision in its minutes:

> Mr. Roberts discussed the various options available under the pension plan—Joint and Survivor, Straight Life Annuity with Five-Year Certain, Level Income and

Lump Sum. All of these are permitted subject to approval of the Committee provided tney are actuarially equivalent. To date, the only options elected have been either the Joint and Survivor Option or Straight Life Annuity with Five-Year Certain. Relative to the Lump Sum Option, a small amount could be approved by the Committee, or if it involved a large amount which possibly could seriously hamper the Plan, by law collateral would be required. Mr. Roberts explained the Committee needs to decide on the interest rate assumptions which will be used to calculate the amount of the lump sum. Mr. Roberts stated he has checked with various insurance companies and the rates they utilize, however, these vary from time to time depending on the money market. Also, the Pension Benefit Guaranty Corporation sets a rate usually for a period of three months which they use on any plans which are terminating.

Mr. Roberts suggested that the Committee adopt a policy which will provide for our establishing a factor for lump sum options at the time the request for a lump sum is received, based on the following:

Ascertain life annuity purchase rates from several insurance companies and the Pension Benefit Guaranty Corporation and establish the rate on an individual case basis with advice from A. S. Hansen, Inc. In this way, we can always stay current as to what the rates are. Fulton Federal's plan provides for a benefit of actuarial equivalent value. At present, we do not have a factor established for lump sum option.

After discussion by the Committee, Hugh W. Phillips made motion that the Committee investigate among various life insurance companies and other institutions to ascertain the current factor being applied to life annuities, and with advice from A. S. Hansen, Inc., make a decision on a rate for the particular benefit to be effective at the retirement date. The Committee will advise the participant of amount calculated as close to

retirement date as possible with stipulation that final calculation will use rate effective at retirement date. Motion was seconded and unanimously approved by the Committee.

Plaintiffs' Exh. 47.

14. According to Mr. Roberts, the December 15, 1980 action of the Committee was taken in fairness to all participants so as to assure all participants their proper share of the funds and not to give any participant any more than his fair share of the funds.

15. The December 15, 1980 decision of the Committee demonstrated a determination that lump sum payments would be calculated using an interest rate reflecting current market rates at or around the date of retirement of the participant. The decision obviously was made because prevailing interest rates in the latter part of 1980 had risen so high that there was substantial discrepancy between market interest rates and the interest rate assumed in the Plan. It was the culmination of discussions and investigations regarding the appropriate discount to arrive at present value for lump sum participants.

In addition to Plaintiffs' Exhibits 62 and 64, see, for example, Defendants' Exhibit 34 and the Actuary's memorandum dated 4/3/80 attached thereto.

16. The decision that a floating formula would be used to determine a fair market interest rate to be applied to lump sum payments was made before either plaintiff had made an election to have benefits paid under the lump sum option.

17. In making previous calculations regarding optional lump sum benefits and present values, the Plan administrators applied the 6% funding rate. The plaintiffs testified that it was on this basis they were led to believe, and did believe, that 6% was the interest assumption that would be used for discounting their normal pension benefits to present value. Defendants testified that in some instances, 6% was

near the market rate at the time, but that in all circumstances such were merely illustrative forecasts, or projections, of what might be because the actual market rate at time of retirement could not be known. They were made primarily for the purpose of projecting monthly income retirement benefits and social security benefits to illustrate the value of those benefits. The court find defendants' explanation credible *See* Plaintiffs' Exhs. 44, 111-114, 120-126.

18. Mr. Roberts testified that because of several discussions he had with Mr. Lewis, he believes plaintiff Lewis was informed of the policy adopted by the Committee on December 15, 1980, and as contained in the Committee minutes. Plaintiffs' Exh. 47. This was disputed by Mr. Lewis in his testimony.

19. Subsequent to December 15, 1980, but prior to October 28, 1981, plaintiffs Lewis and Embry indicated an intent to terminate employment on November 30, 1981 and January 15, 1982, respectively, and expressed an interest in the lump sum distribution benefit.

20. After their expressions of interest in the lump sum option, the Committee acted pursuant to its December 15, 1980 policy to adopt an interest rate for lump sum distribution and consulted with actuaries, insurance companies, the Federal Reserve Bank, its attorney and other sources to establish a proper and reasonable rate.

21. Although the Committee had anticipated the need to determine a basis for lump sum payments, no precise formula had been adopted by the Committee at the time Lewis and Embry indicated their interest because no lump sum payment had ever been made by the Plan up to that time. Upon receipt of plaintiffs' expressions of interest in the lump sum option, the Committee, through its Chairman, established a floating formula for determining the discount interest rate for plaintiffs and for all other persons electing the optional lump sum benefit.

22. The Committee learned that other plans were using floating formulas based on a variety of interest discount calculations, including the interest rate for Treasury Notes and Bonds at certain periods, the interest rates on Moody's AAA Bond Index, the Pension Benefit Guaranty Corporation interest rates and insurance company annuity rates.

23. The Committee, through its Actuary, received quotations reflecting the market interest rates at the time of Mr. Lewis's inquiries regarding the lump sum option. Plaintiffs' Exh. 17. Those market interest rates included the following:

PBGC rate	— 10.50%
PBGC rate effective 11/1/81	— 10.75%
Moody's AAA Bond rate plus 1%	— 12.10%
Average rate on 20-year Treasury Notes	— 13.65%
Bankers Life of Des Moines	— 15.55%
Massachusetts Mutual	— 16.20%

24. On October 28, 1981, the Committee determined to follow the recommendations of A. S. Hansen, Inc, the Plan's actuary, to calculate lump sum benefits on the twenty-year U.S. Treasury Note and Bond average for the fourth, fifth and sixth month immediately prior to retirement. Plaintiffs' Exh. 51.

25. The Committee on that same day approved a lump sum benefit of $122,404.65, utilizing an interest rate of 13.65% if plaintiff Lewis elected the lump sum option.

26. On October 30, 1981, plaintiff Lewis elected a lump sum benefit but subsequently contested the amount approved by the Committee.

27. Based on the same Treasury note and bond formula used for plaintiff Lewis, the Committee, on November 24, 1981, approved a lump sum benefit of $40,917.30, utilizing an interest rate of 14.5% if plaintiff Embry elected the lump sum option. Plaintiffs' Exh. 52.

28. On December 4, 1981, plaintiff Embry elected the lump sum benefit, but contested the amount approved by the Committee.

29. John T. Laury, account executive with A. S. Hansen, Inc., the Plan Actuary, testified that, in his opinion, the Plan's determination of actuarial equivalency was fair to the recipients and to the other members of the Plan.

30. The Committee considered appeals by the plaintiffs as to the amounts of their lump sum benefits and determined that said benefits were properly calculated.

31. Plaintiffs and their expert witness, Joe Gregg Buckalew, of Coopers & Lybrand, admitted that the interest rates and the formula applied by the Plan Committee were reasonable. While plaintiffs seemed to admit that the payment of lump sum benefits at a 6% discount rate would result in a windfall to them, nevertheless they argued that the Plan document and the law require the payment of this windfall.

Plaintiffs further contended that the 6% discount rate which should have been applied in computing their lump sum benefits was exactly equal to the investment return rate assumed by the Plan actuaries, A. S. Hansen, Inc., and that, as a consequence, it would result in no "unanticipated loss" to the Plan whereas use of a higher rate would result in an unanticipated experience gain or windfall to the Plan which ultimately inures to the benefit of the Plan's sponsor, Fulton Federal Savings and Loan Association, in the form of reduced minimum required contributions.

32. Regardless of who might be the recipient of such "windfall", plaintiffs have failed to prove that, in establishing interest rate to be used for the calculation of lump sum benefits, the Committee acted arbitrarily or capriciously or otherwise than in the interest of the Plan's participants and beneficiaries.

33. Plaintiffs and defendants differ with respect to whether or not the Committee has continually tendered the

lump sum amounts determined by it to be payable to plaintiffs until the same was accepted by plaintiffs on or about April 27, 1983. Plaintiffs contend that there was no unconditional tender and for this reason each plaintiff is entitled to interest from the date of retirement until the time the undisputed portions of the benefits at issue were paid to the plaintiffs. The court finds that the Committee has continually tendered the lump sum amounts determined by it to be payable to the plaintiffs and, accordingly, plaintiffs are not entitled to interest on the undisputed portion of their benefits.

34. Under the Agreement of Trust dated March 1, 1977, the Trustee is charged with the general administration of the Trust Funds. The general duties of the Trustee are set forth in Article II of that document, which provides, in pertinent part, that:

> The Plan Administrator shall have no authority to direct or control investment or change of investment of the Fund. Orders from the Plan Administrator need not specify the purpose of the payments so ordered, and the Trustee shall not be responsible in any way respecting the purpose or propriety of such payments or for the administration of the Plan. Any such order shall constitute a certification that the payment directed is one which the Plan Administrator is authorized to direct . . . It is expressly understood that the duties and obligations of the Trustee shall be only those expressly stated in this Agreement. If a dispute arises as to who is entitled to or should receive any benefit or payment, the Trustee may withhold or cause to be withheld such payment until the dispute has been resolved.

Plaintiffs' Exh. 6.

35. With respect to the Trustee's liability, Article VI of the Trust Agreement provides as follows:

> The Trustee shall not be liable for following the directions of the Plan Administrator unless it is clear on the face of such directions that the action to be taken by the

Trustee would violate said Trustee's fiduciary responsibilities as set out in the Employee Retirement Income Security Act of 1974 or be contrary to the terms of this Agreement.

CONCLUSIONS

1. This court has jurisdiction over this action pursuant to Sections 502(e) and (f) of ERISA, 29 U.S.C. § § 1132(e) and (f). Venue properly lies in this district. 29 U.S.C. § 1132(e)(2).

2. The individual defendants, whether Committee or Trustee, are fiduciaries within the meaning of ERISA and are bound to follow the terms of the Plan documents.

3. Section 1.02 of the Plan defines the term "actuarial equivalent" and states that it may be computed on the basis of the interest rate last adopted for purposes of the actuarial evaluation used to determine contributions to the Plan, "or on such other basis as may be adopted by the Committee". This provision grants the Committee the power to apply an interest rate to determine actuarial equivalency in connection with lump sum payments other than the interest rate used for determining the amount of contribution to the Plan by the Plan sponsor.

4. Plaintiffs argue that this provision is inconsistent with the provision of Section 11.05 of the Plan. *See* Finding of Fact No. 8, *infra*. Section 11.05 appears among the general provisions relating to the administration of the Plan by the Committee and it does not deal specifically with the question of actuarial equivalency involving the optional mode of payment by lump sum. The second sentence of Section 11.05, read in context with the first sentence, as it must be, strongly suggests that the entire section relates solely to actuarial calculations used to fix the rates of contribution payable to the Plan.

5. Should the general language of Section 11.05 be construed to require a single interest rate for all actuarial computations, as plaintiffs argue, it would be inconsistent

with the specific language of Section 1.02 of the Plan dealing with "actuarial equivalent" forms of benefits and with Section 12.04 of the Plan. The latter section provides that, upon termination of the Plan, the actuarial requirements of the Plan shall be determined by the Actuary by the use of such "interest rates" (plural) as the Actuary shall recommend and the Committee shall approve. The court concludes that the general provisions of Section 11.05 were not intended to, and did not, take precedence over or abrogate, the specific powers granted by Sections 1.02 and 12.04. The Committee properly interpreted Section 1.02 of the Plan to allow it to establish current fair market interest rates in discounting periodic benefits to present value for the lump sum option.

6. Plaintiffs contend that Section 11.05 of the Plan is the only provision which gives the Committee the power to establish an interest rate for purposes of computing lump sum benefits. Section 11.08 of the Plan sets forth the powers of the Committee, however, and those powers include the right to establish and enforce rules, to interpret the Plan, to decide all questions concerning the Plan and the eligibility of any employee, and to compute the amount of benefits which shall be payable to any participant. Section 6.03 grants the specific authority to make a lump sum payment of benefits, provided the amount determined is the actuarial equivalent of the normal benefit of monthly income defined in the Plan itself. Section 11.08, entitled "Powers of the Committee", provides as follows:

> 11.08 *Powers of the Committee.* The Committee shall have full power to administer and interpret the Plan,

including but not limited to the following powers and duties:

(a) To establish and enforce such rules, regulations and procedures as it shall deem necessary or proper for the efficient administration of the Plan;

(b) To interpret the Plan, its interpretation thereof in good faith to be final and conclusive, subject to the Claims Procedure described below;

(c) To decide all questions concerning the Plan and the eligibility of any Employee to participate in the Plan;

(d) To compute the amount of benefits which shall be payable to any Participant, Retired Participant, Beneficiary, or Spouse, in accordance with the provisions of the Plan and to determine the person or persons to whom said benefits shall be paid;

(e) To authorize the payment of benefits;

(f) To establish a funding policy and method as required by the Employee Retirement Income Security Act of 1974 and to review said funding policy and method no less often than annually. The Committee shall provide the Trustee with a written statement of said funding policy;

(g) To establish a Claims Procedure and Claims Review Procedure.

In the exercise of all its functions, the Committee shall act in an impartial, uniform and non-discriminatory manner.

7. Section 6.03 of the Plan is keyed to the definition of an actuarial equivalent contained in Section 1.02 of the Plan which provides that the actuarial equivalent shall be computed on the basis of the interest rate last adopted for purposes of determining contribution to the Plan "or on such other basis as may be adopted by the Committee." The

Committee thus had power under these provisions of the Plan to determine the interest rate for purposes of calculating lump sum benefits independently of the provisions of Section 11.05. The definition of actuarial equivalency in the Plan envisions an "either/or" option available to the Committee, that is, the use either of the funding rate or another rate. If the funding rate is the only rate which could be used, the reference to another basis for computing the actuarial equivalent would be not only superfluous but contradictory of that intent.

8. The second sentence of Section 11.05 specifically relates to establishing rates of contribution payable to the Plan, and the first sentence of Section 11.05 must be read in conjunction with the second sentence. If Section 11.05 is construed in its context to refer only to the funding rate, there would be no conflict between the two provisions. The evidence is undisputed that there can be, at any given time, only one rate of regular interest which, compounded annually shall be used in all actuarial computations for funding purposes. Although Sections 11.08, 6.03 and 1.02 grant authority for computing benefits, Section 11.05 is the only section in the Plan that grants authority to the Committee to establish the interest rate for purposes of determining contributions to the Plan.

9. In interpreting the Plan the Committee must act for the exclusive benefit of all the participants, and for no less than all. If there is, indeed, a conflict and ambiguity between the Plan document provisions, the Committee has the power to interpret and resolve any such ambiguity or contradiction, and it must do so in an impartial, uniform and non-discriminatory manner.

10. The Plan was not designed to provide windfall benefits. The Committee properly looked to the interests of all participants in preserving the assets of the pension trust and their interpretation of the Plan so as to effect the

purposes of the plan and the intent of the parties was in no way arbitrary or capricious.

11. But even if the court did not agree with the Committee's interpretation of the Plan, it must recognize the authority of the Committee under the powers enumerated in Section 11.08 of the Plan to interpret the same and to sustain its decision unless the plaintiffs can prove that its interpretation was arbitrary or capricious. *Sharron* v. *Amalgamated Insurance Agency Services, Inc.,* 704 F.2d 562 (11th Cir. 1983); *Paris* v. *Wolf, Inc. Profit Sharing Plan, Inc.,* 637 F.2d 357, *cert. denied,* 454 U.S. 836 (1981); *Bayles* v. *Central States, Southeast and Southwest Areas Pension Fund,* 602 F.2d 97, 99 (5th Cir. 1979). *Accord Denard* v. *Richards Group, Inc.,* 681 F.2d 306 (5th Cir. 1982).

12. In applying the arbitrary or capricious standard, courts consider various factors: (1) uniformity of construction of plan provisions; (2) "fair reading" and reasonableness of that reading; and (3) unanticipated costs. *Bayles,* 602 F.2d at 100. When viewed in terms of the Committee's proper and reasonable interpretation of the Plan and taking into consideration all of the facts and circumstances of this case, including the fact that the Committee adopted its policy of utilizing a fair market interest rate to value lump sum benefits in December of 1980, about one year before plaintiffs sought payment of lump sum benefits, the Committee's interpretation of the Plan was not arbitrary or capricious.

13. Had the Committee allowed plaintiffs to receive windfall benefits from the Plan through the use of totally unrealistic and unreasonable interest rates, the Committee could well have been liable to the remaining Plan participants and beneficiaries for allowing a depletion or diminution of the Plan assets. Under the exclusive benefit rule, "the fiduciary is forbidden from granting preferences between a plan's participants or as between a plan's beneficiaries," *Winpisinger* v. *Aurora Corp.,* 456 F.Supp. 559, 566 (N.D. Ohio 1978). Section 404(a)(1) of ERISA, 29 U.S.C. § 1104(a)(1), which requires a fiduciary to act "solely in the interest of the

participants and beneficiaries" of the Plan, is violated when the fiduciary jeopardizes the soundness of the fund by favoring one group over the remainder of the Plan participants or providing a greater benefit than otherwise is provided under the Plan documents. *Shaw* v. *Kruidenier,* 470 F.Supp. 1375, 1390 (S.D. Iowa 1979); *Winpisinger* v. *Aurora Corp.,* 456 F.Supp. 559, 566, 573 (N.D. Ohio 1978). Windfall payments to plaintiffs could have exposed the defendants to liability.

14. The Trustee, charged under the Plan and Trust Agreement with investing and managing the funds, not with the administration of the Plan, is not guilty of any fiduciary violation. The court concludes that the Trustee at all times acted solely in the interest of the Plan participants and beneficiaries in accordance with the documents and instruments governing the Plan. 29 U.S.C. § 1104(a)(1)(D).

15. Plaintiffs contend that defendants provided lump sum illustrations, estimates and projections using the 6% funding assumption rate as a discount factor and that it was on this basis that they were led to believe, and did believe, that the 6% interest rate would be used in discounting the normal benefit to present value. Ms. Embry received only the "Personal Statement of Benefits", in the same form as those received by Mr. Lewis, and they did not contain any lump sum estimate, projection or illustration relating to lump sum benefits. The "Personal Statement of Benefits" received by Mr. Lewis and Ms. Embry accurately stated their benefits. Plaintiffs' Exhs. 111-114.

16. The "Personal Statement of Benefits" included the following disclaimer:

> Reasonable measures have been taken to make your report accurate. However, the amount and availability of the benefits will be governed by the provisions of the legal documents pertaining to the various benefits reported. Your BENEFACTS report does not constitute such a legal document.

This is the kind of disclaimer recommended by plaintiffs' expert, Mr. Buckalew.

The only present value stated in the "Personal Statement of Benefits" was the following:

> It is interesting to note, it would cost approximately $_____ at age 65 to purchase your retirement and social security monthly benefits.

This statement does not constitute an estimate of benefits nor did it refer to any former benefits available under the Plan.

17. In the estimate or illustrated projection of benefits provided to Mr. Lewis in 1977, the testimony is unrefuted that the 6% discount factor there used was properly and reasonably applied because the prevailing market rates in 1977 were more or less consistent with the 6% interest rate, and further, the illustration of those benefits was an estimated projection which would only be available in the future. It was an estimate and the actual market rate, or for that matter the actual funding rate, at the time of Mr. Lewis's retirement could not have been known in 1977. Plaintiffs' Exh. 44.

18. Mr. Lewis was aware of his monthly annuity benefits pursuant to the Plan, and presumably he had access to the Committee minutes advising of the 1980 policy decision to apply market rates to discount normal benefits to present value. Plaintiffs' Exh. 47. Mr. Lewis was, therefore, apprised actually or constructively of the benefits which he could anticipate receiving. It is difficult for the court to understand how either Mr. Lewis or Ms. Embry, both bankers, could anticipate receiving lump sum payments based on an interest rate which clearly could not result in the actuarial equivalent of what they would have received as normal monthly income benefits.

19. Plaintiffs contend that the defendants' interpretation of the Plan and their actions resulting therefrom violate Rev. Rul. 79-90 and Rev. Rul. 81-12 promulgated by the

Internal Revenue Service. The court finds that those revenue rulings are inapplicable to this case and were not violated. Revenue Ruling 79-90 adopted a new policy requiring actuarial assumptions to be specified in a retirement plan. Revenue Ruling 81-12 is dependent upon Rev. Rul. 79-90 for its applicability, and does not apply to plans which are not yet required to comply with Rev. Rul. 79-90, due to the novelty of the policy set forth in Rev. Rul. 79-90, the IRS provided for delayed application of the revenue ruling to plans already in existence. The IRS stated:

> Inasmuch as employers may not have been aware that a plan must specify assumptions in these circumstances, this revenue ruling, pursuant to the authority contained in section 7805(d) of the Code, will not be effective for any plan in existence on March 12, 1979, until the first plan year beginning after December 31, 1983. At that time the ruling will be effective only with respect to participants who either separate from service or accrue benefits on or after the date the ruling applies to the Plan.

Plaintiffs' Exh. 105. The Fulton Federal Plan was in existence on March 12, 1979.

20. Revenue Ruling 79-90 also stated that it would be immediately effective as to plans already having specified assumptions within the meaning of the ruling. The Fulton Federal Plan does not specify its actuarial assumptions. There is no interest rate set forth anywhere in the Plan. Moreover, the interest rate used for purposes of determining contributions was subject to being changed from time to time in the discretion of the Committee. It cannot be said that there was a rate specified in the Plan which would have been outside the reach of the Committee's discretion, either for funding purposes or for lump sum discount purposes.

21. The discretion vested in the Committee for establishing a rate for funding purposes is sufficient to make Rev. Rul. 79-90 and Rev. Rul. 81-12 inapplicable to the Fulton Plan. In addition to having the authority to change the

interest rate used for purposes of determining contributions, the Committee also had discretionary power under Section 1.02 to determine actuarial equivalence on the basis of the rate used for determining contributions "or on such other basis as may be adopted by the Committee". This discretionary power demonstrates that no actuarial factor was already specified in the Plan. It is, therefore, clear that these revenue rulings are not effective as to the Fulton Plan until 1984.

22. If the exercise of Committee discretion to deny a lump sum benefit is appropriate, *Pompano* v. *Shiavone,* 680 F.2d 911 (2d Cir. 1982), the reasonable exercise of Committee discretion in a way which merely determines the amount of an optional lump sum benefit is not per se illegal.

23. The Committee made a continuing and unconditional tender of the lump sum benefits awarded under the Plan until such time as the tender was accepted and benefits were paid to the plaintiffs on or about April 27, 1983. As a consequence, the plaintiffs have no entitlement to interest on any portion of the benefits, including the undisputed portions.

24. Plaintiffs seek punitive damages in this case, without regard to whether or not defendants' conduct was sufficiently wilful, malicious or outrageous to justify the same in the normal circumstance. Plaintiffs have no right to punitive damages in this case because none are provided for under ERISA. "Ordinarily punitive damages are not presumed; they are not the norm; and nowhere in ERISA are they mentioned. If Congress had desired to provide for punitive damages, it could easily have so stated, as it has in other acts." *Dependable* v. *Falstaff Brewing Corp.,* 653 F.2d 1208, 1216 (8th Cir.), *cert. denied,* 102 Supreme Court 512, 641 (1981) (dictum); *Ziskind* v. Retail Clerks International Ass'n, _____F.Supp._____. 3 E.B.C 1012 (E.D. Calif. 1982); *Calhoun* v. *Falstaff Brewing Corp.,* 478 F.Supp. 357 (E.D. Mo. 1979); *Hearn* v. *Retirement Fund Trust of Plumbing,* 224 F.Supp. 80 (C.D. Cal. 1976); *Pfister* v. *Delta Air Lines,* No. C78-1567A (N.D. Ga. Dec. 21, 1978) (appeal dismissed,

No. 79-3207 (5th Cir. Nov. 5, 1979)); and *Whittaker* v. *Texaco, Inc.,* No. C83-174A (N.D. Ga. June 27, 1983).

25. Under the standard set forth in *Ironworkers Local No. 272* v. *Bowen,* 624 F.2d 1255 (5th Cir. 1980), the prevailing defendants may be entitled to costs and attorney fees under ERISA, Section 502(g), 29 U.S.C. § 1132(g). According to *Bowen,* several factors should be considered in deciding whether or not to award attorney fees. They are: (1) the degree of the opposing party's bad faith or involvement; (2) the opposing party's ability to pay; (3) the deterrent effect on others in similar circumstances; (4) whether the parties seeking the fees sought to benefit others affected by the plan or to resolve a significant legal issue regarding ERISA; and (5) the relative merits of the parties' positions. *Id.* at 1266. Defendants argue that plaintiffs' refusal to accept their unconditional tender and to petition the court to force payment into the court's registry is sufficient bad faith to trigger the award. Defendants claim, in addition, that they defendants for the benefit of all participants and beneficiaries and, unlike plaintiffs who sought to benefit themselves, defendants' actions benefitted all participants and beneficiaries in protecting and safeguarding the Plan's funds and the integrity of the Plan's sponsor.

While there may be some merit to defendants' position, this court does not believe that plaintiffs were motivated solely by self-interests and bad faith. Considering the *Bowen* factors, the court declines to award attorney fees. Having concluded that plaintiffs are not entitled to any of the relief they seek, the Clerk is hereby ORDERED to enter judgment in favor of all defendants against all claims of the plaintiffs.

IT IS SO ORDERED.

This, the _____ day of November, 1986

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